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Supreme Court, U.S.
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No. 02-____

IN THE
Supreme Court of the United States

KIM NETLAND,

Petitioner,

v.

HESS & CLARK, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Federal, Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v, preempt state-law product-liability claims premised on a defendant pesticide manufacturer's failure to warn of the pesticide's hazards and to properly design the pesticide?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kim Netland respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion affirming the grant of summary judgment to respondent is reported at 284 F.3d 895 (8th Cir. 2002), and is reproduced in the appendix at 1a. The unreported order of the Eighth Circuit denying panel rehearing and rehearing en banc is reproduced in the appendix at 24a. The opinion of the United States District Court for the District of Minnesota granting respondent's motion for summary judgment is reported at 140 F. Supp. 2d 1011 (D. Minn. 2001), and is reproduced in the appendix at 11a.

JURISDICTION

The judgment of the Eighth Circuit was entered on March 26, 2002. Petitioner filed a timely petition for rehearing en banc on April 8, 2002, which the Eighth Circuit treated as a petition for panel rehearing and for rehearing en banc and denied on May 13, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

7 U.S.C. § 136v provides in pertinent part:

Authority of States

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the

extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

STATEMENT OF THE CASE

Petitioner Kim Netland alleges that he has suffered severe and permanent injuries from exposure to Bovinol, a pesticide marketed by respondent Hess & Clark. The Eighth Circuit held that, as a matter of federal law, petitioner is barred from pursuing his Minnesota state-law product-liability claims. Specifically, that court ruled that all of petitioner's damages claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), a statute enacted to protect people and the environment from pesticide hazards. As explained in more detail below, this Court should grant review because the federal and state courts are in conflict on the question presented and because the Eighth Circuit's decision is at odds with FIFRA's text and purpose.

Because an understanding of FIFRA is necessary to evaluate the preemption issue, Part A describes the structure of the Act. Part B explains the factual background of this case and the decisions below.

A. The Structure Of FIFRA.

The Eighth Circuit ruled that FIFRA's preemption provision, 7 U.S.C. § 136v(b), preempts all of petitioner's damages claims. That provision can be construed properly only

in the context of FIFRA's substantive requirements. FIFRA is the federal component of a tripartite scheme in which pesticides are regulated at the federal, state, and local levels. *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597 (1990). FIFRA requires that the federal Environmental Protection Agency ("EPA") make certain regulatory decisions regarding pesticides, but the Act rarely forbids a state or local government from supplementing EPA decisions. For example, a pesticide generally may not be sold or used in the United States without an EPA registration. 7 U.S.C. § 136a(a). Although state and local governments generally may not permit the sale or use of any pesticide not registered with EPA, they may regulate or ban outright the sale and use of a federally registered pesticide. 7 U.S.C. § 136v(a). For instance, Minnesota may restrict the use of dichlorvos, the active pesticide ingredient at issue in this case, or ban its use entirely. In this way, federal pesticide regulation establishes a floor that may be exceeded by additional state regulations. Moreover, FIFRA gives states the lead role in enforcing pesticide use restrictions. 7 U.S.C. § 136w-1.

Unlike federal statutes governing cigarette and smokeless tobacco labels, FIFRA does not mandate precise wording for pesticide labels. *Cf.* 15 U.S.C. §§ 1333, 4402(a)(1). Nor do EPA's regulations dictate any specific language to be used for the majority of pesticide labels.[1] *Compare* 21 C.F.R. §§ 801.420, .430 (FDA regulations demanding specific label warnings for particular medical devices). Rather, as part of an application for a pesticide

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[1]EPA requires signal words ("warning" or "caution") for four toxicity categories and precise precautionary statements for three. 40 C.F.R. § 156.10(h). The warnings and precautionary statements in connection with these categories generally must appear verbatim on the label.

registration, the manufacturer submits not only health and environmental data, but also a draft label. 7 U.S.C. § 136a(c)(1)(C); 40 C.F.R. § 152.50(e). EPA has made clear that "[t]he registrant must take responsibility for quality control of the product's composition and for adequate labeling describing the product, its hazards and uses." 53 Fed. Reg. 15,952, 15,956 (May 4, 1988).

EPA will register a pesticide if the manufacturer meets FIFRA's requirements. 40 C.F.R. § 152.112. The statute requires that the pesticide's composition warrant the claims made for it, that its labeling and other materials comply with FIFRA's requirements, that it will perform its intended function without unreasonable adverse effects on the environment, and that it will not generally cause unreasonable adverse effects on the environment when used in accordance with widespread and commonly recognized practice. 7 U.S.C. § 136a(c)(5)(A)-(D).

As to the product label, FIFRA and EPA establish certain minimum requirements: Pesticide labels must contain an EPA registration number, the registrant's name and address, the pesticide's name, brand, or trademark, the net weight or other measure of content, the use classification of the pesticide, an ingredient statement, directions for use, a warning or cautionary statement that is adequate to protect health and the environment, and, for pesticides that are highly toxic to humans, specific signal words and a description of appropriate first-aid treatment. 7 U.S.C. § 136(q)(1)(D),(G) & (2)(A)-(D); 40 C.F.R. § 156.10(a)(1); *see supra* note 1. Any information required under FIFRA to be on a pesticide's label must be prominently and conspicuously placed in comparison to other labeling information that is not federally mandated. 7 U.S.C. § 136(q)(1)(E); 40 C.F.R. § 156.10(a)(2).

With respect to directions for use, FIFRA contains only

very general requirements: Pesticide labels must contain directions necessary to effectuate the product's intended purpose and adequate to protect against fraud, personal injury, and unreasonable health and environmental effects. 7 U.S.C. § 136(q)(1)(F); 40 C.F.R. § 156.10(i)(1)(i). Thus, EPA regulations provide that directions for use must specifically identify the crops or animals to be treated, the dosage rate associated with each site and pest, instructions for dilution, other application instructions needed to obtain effective results, and "[a]ny limitations or restrictions on use to prevent unreasonable adverse effects." *Id.* § 156.10(i)(2)(iii),(iv),(vi),(vii), (x).

A registrant's use of the label submitted with its registration application does not necessarily satisfy the registrant's FIFRA (or other) obligations. To the contrary, a pesticide is misbranded if, notwithstanding EPA's registration of the pesticide and acceptance of the label, it fails to contain whatever additional warnings are necessary to protect against unreasonable adverse health and environmental effects. 7 U.S.C. § 136(q)(1)(F)-(G). Indeed, EPA has recognized that "[f]or liability reasons, companies often voluntarily provide additional information on the label, particularly in the area of precautionary statements." 49 Fed. Reg. 37,960, 37,971 (Sept. 26, 1984). Neither FIFRA nor EPA regulations prohibits the inclusion of additional label information or warnings, provided that the information does not violate any specific statutory or regulatory requirement. *Id.*

Because EPA depends so heavily on manufacturer submissions, FIFRA imposes *continuing* obligations on registrants to submit complete, up-to-date information to EPA. Registrants have ongoing obligations to provide to EPA all factual information that they have regarding unreasonable adverse environmental effects, 7 U.S.C. § 136d(a)(2), and

ongoing obligations to ensure that their labeling complies with FIFRA's requirements. 7 U.S.C. §§ 136(q)(1), 136j(a)(1)(E). Thus, FIFRA anticipates that a manufacturer may have to make labeling changes after registration of its product. FIFRA provides that "[i]f the labeling or formulation for a pesticide is changed, the registration shall be amended to reflect such change if the Administrator determines that the change will not violate any provision of this [Act]." 7 U.S.C. § 136a(f)(1). In other words, the onus for deciding whether a label change is necessary falls on the registrant, which must draft the revised label and submit it to EPA for review. 40 C.F.R. § 152.44.

Although section 136v(b) preempts state "labeling or packaging" requirements "in addition to or different from" FIFRA requirements, the submitted labeling is limited to "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers," or other detached written matter accompanying the pesticide, such as an instructional booklet, that serves the same purpose as a label. 7 U.S.C. § 136(p)(1) & (2)(A). The Act expressly leaves manufacturers of registered pesticides many other unrestricted means of conveying information to purchasers and users. For example, EPA's regulations identify the following means of conveying information: "[b]rochures, pamphlets, circulars and similar material offered to purchasers at the point of sale or by direct mail; [n]ewspapers, magazines, newsletters and other material in circulation or available to the public; [b]roadcast media such as radio and television; [t]elephone advertising; and [b]illboards and posters." 40 C.F.R. § 152.168(b). Unlike labeling, manufacturers do not submit such materials to EPA for review and approval as part of the registration process.

If a pesticide label contains false or misleading statements or lacks directions for use and warnings that are adequate to protect health and the environment, the pesticide is

misbranded. 7 U.S.C. §§ 136(q)(1), 136j(a)(1)(E), 136j(a)(2)(C) & (M). In an administrative action to cancel a pesticide's registration or to seize or bar use or sale, EPA registration is not a defense. 7 U.S.C. § 136a(f)(2) (although if no cancellation proceedings are in effect, registration is *prima facie* evidence of compliance with FIFRA's registration provisions). Violations warranting EPA action include labeling that lacks required information and products that cause unreasonable environmental effects even when used as directed on the label. 7 U.S.C. §§ 136j & 136k(b)(3); *see also id.* § 136l (authorizing civil and criminal penalties for FIFRA violations).

FIFRA does not provide a remedy for individuals who sustain injuries from pesticide use, and thus state-law damages actions provide the only means of compensation for such injuries.

B. Factual Background And Proceedings Below.

1. Kim Netland's Injuries. In the summer of 1994, petitioner Kim Netland was 17 years old and preparing to enter his senior year in high school. That summer, petitioner sprayed respondent's pesticide, Bovinol, to control flies on his family's three horses. Petitioner's mother, Margaret Netland, purchased the Bovinol at a local feed store and gas station because she wanted to minimize the risk of injury to her son from the horses' unpredictable behavior when they were annoyed by flies. Mrs. Netland asked the sales clerk whether Bovinol would work on horses, and he said that it would. Using a spray bottle prepared by his mother, Kim sprayed Bovinol on his horses three to four times per week for six weeks. He would spray each horse with eight to 10 squirts and then ride one of the horses. Kim did not wear any protective clothing or equipment when he used the pesticide and did not read the label (though his mother had read it when she prepared the spray

bottle). He believes that Bovinol got on his skin while riding the horses because his clothes were damp after riding. *See* Pet. App. 2a. He also inhaled the Bovinol spray. *See, e.g.*, Dep. of Harry S. Jacob, M.D., at 61, 67.

In mid-August 1994, Kim started high school football practice and became very fatigued and began bruising easily. On September 28, 1994, he collapsed on his way to school and was taken to his family physician, who realized that he had a severe blood problem and transferred him to a hematologist in Fargo, North Dakota. The hematologist diagnosed Kim with acquired aplastic anemia, a defective functioning of the bone marrow in which the body fails to produce all types of blood cells. Pet. App. 3a; *see Stedman's Medical Dictionary* 72 (25th ed. 1990). Over the next year, Kim took large doses of steroids and had approximately 35 blood transfusions. As a result of the treatments, one of his hips had to be replaced with a prosthetic hip and the other hip is at risk of failure. Pet. App. 3a.

2. Bovinol. Bovinol is registered with the EPA and its label was approved by the EPA. Its active ingredient is dichlorvos, an organophosphate whose purpose is to interfere with neural transmission. Dichlorvos can be absorbed into the human body by ingestion, by inhalation, and through the skin. Pet. App. 3a. Despite its EPA registration, the dangers of dichlorvos have not gone unnoticed. In 1988, the EPA notified registrants that it was instituting a "special review" of dichlorvos. Plaintiff's Statement of Material Disputed Facts, ¶¶ 35-36. In doing so, the agency stated that exposure to dichlorvos may pose serious adverse health risks to individuals. *Id.* ¶ 37. In 1995, the EPA preliminarily proposed to cancel use of dichlorvos-containing products in all residential areas and to prohibit all hand-held applications to farm livestock (except poultry). *Id.* ¶ 43; *see* 60 Fed. Reg. 50,338, 50,369 (Sept. 28, 1995). Numerous peer-reviewed articles link dichlorvos to

autoimmune disease, including aplastic anemia. *See, e.g.*, Aff. of Harry S. Jacob, M.D., ¶ 15 (listing and describing articles).

The Bovinol label indicates that the product may be used on cattle, in animal buildings, including specifically horse barns, and for certain outdoor uses (such as on picnic grounds, refuse areas, and around service stations). The label does not expressly state that Bovinol may be used on horses or that it should not be used on horses, although it does state that it should not be used on dogs. *See* Pet. App. 3a-4a.

3. Proceedings Below. On July 1, 1999, petitioner filed a three-count complaint in the United States District Court for the District of Minnesota alleging that respondent (1) was strictly liable because Bovinol was defectively designed and unreasonably dangerous, including specifically that it exposes users unreasonably to immune system damage such as that caused by aplastic anemia, Complaint, ¶¶ 12-13; (2) failed to warn users of Bovinol's dangerous characteristics, *id.* ¶ 15; and (3) was negligent and breached its warranty that Bovinol was safe for its ordinary purposes by failing to use reasonable care in the design, manufacture, and sale of the product. *Id.* ¶ 18. *See generally* Pet. App. 4a-5a. The district court's jurisdiction was premised on diversity of citizenship under 28 U.S.C. § 1332(a)(1). Complaint, ¶ 1.

In January 2001, respondent moved for summary judgment, asserting that FIFRA preempts all of petitioner's state-law claims. Respondent also sought summary judgment on the ground that petitioner had not offered proof of causation linking Bovinol to his injuries and it simultaneously moved to exclude the testimony of several of petitioner's experts.

The district court granted respondent's motion for summary judgment solely on preemption grounds. Pet. App.

11a. The district court concluded that each of petitioner's claims, even those based on defective design of the product, is an attack on Bovinol's labeling and thus preempted by FIFRA's preemption provision, 7 U.S.C. § 136v(b), which, as discussed above, bars states from imposing certain types of pesticide labeling and packaging requirements. *See* Pet. App. 19a-22a.[2]

The Eighth Circuit affirmed. The court relied on its prior decision in *National Bank of Commerce v. Dow Chemical Co.*, 165 F.3d 602 (8th Cir. 1999), which held that "FIFRA preempts state common law claims for 'inadequate labeling or failure to warn.'" Pet. App. 6a (quoting *National Bank of Commerce*, 165 F.3d at 608). Petitioner acknowledged the Eighth Circuit's precedent, but urged the panel to reverse course in light of this Court's decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the views of the United States on the issue, and recent precedent from state appellate courts in Montana and Oregon. The panel refused to consider those arguments because of its rule that circuit precedent may only be overruled by a decision of the full court sitting en banc. Pet. App. 7a. The panel also held that petitioner's design-defect claim is preempted because it constitutes "an impermissible challenge to the pesticide's label." Pet. App. 9a.

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[2]The district court did not reach the causation and admissibility issues. Petitioner's experts testified that, given the chronology of events, petitioner's injuries, the medical literature linking dichlorvos and other organophosphates with autoimmune disease, including aplastic anemia, and the absence of other causal explanations, the only plausible explanation for petitioner's aplastic anemia was his exposure to Bovinol. *See, e.g.*, Aff. of Harry S. Jacob, M.D., ¶¶ G.1- G.11; Aff. of Richard L. Lipsey, Ph.D., ¶¶ 25-27. Although respondent disagreed, these issues have never been decided in this case; preemption was the only issue decided below and is the only issue before this Court.

Petitioner sought rehearing en banc, asking the full court to reconsider its prior FIFRA preemption holdings on the basis of more recent precedent. The petition was denied on May 13, 2002.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, this Court should grant review to resolve conflicts in appellate authority regarding the question presented: whether FIFRA preempts state-law damages claims premised on a manufacturer's failure to warn of a pesticide's hazards and on defects in the pesticide's design. Second, the majority of decisions on the question presented, including the decision below, have seriously erred in interpreting FIFRA and its preemption provision, and have thereby eliminated injured persons' rights to compensation under state law contrary to Congressional intent.

A. This Court Should Resolve The Conflicts In Appellate Authority On The Question Presented.

1. Petitioner acknowledges that a large majority of FIFRA preemption decisions, including decisions of most of the federal circuit courts, hold that state damages actions are among the "requirements" within the preemptive reach of 7 U.S.C. § 136v(b). *See, e.g., Taylor Ag Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992); Pet. App. 6a (citing Eighth Circuit decisions to that effect). Those decisions also hold that damages actions alleging that the defendant failed to warn of a pesticide's dangers are preempted by 7 U.S.C. § 136v(b), under which states are prohibited from issuing certain "requirements" concerning pesticide "labeling or packaging" that are "in addition to or different from" FIFRA requirements.

Several decisions, however, directly conflict with the majority view, and hold that state damages actions are not "requirements" within the meaning of section 136v(b). Those rulings include the early decision of the District of Columbia Circuit in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), and the relatively recent decisions of the Montana Supreme Court in *Sleath v. West Mont Home Health Services, Inc.*, 16 P.3d 1042 (Mont. 2000), *cert. denied sub nom., Dow AgroSciences LLC v. Sleath*, 122 S. Ct. 40 (2001),[3] and the Oregon Court of Appeals in *Brown v. Chas. H. Lilly Co.*, 985 P.2d 846 (Or. App. 1999), *rev. denied*, 6 P.3d 1098 (Or. 2000). In addition, the California Court of Appeal held in 1998 that FIFRA does not expressly preempt state-law damages actions. *Etcheverry v. Tri-Ag Services, Inc.*, 76 Cal. Rptr.2d 466 (Cal. App. 3d Dist. 1998). Although the California Supreme Court reversed that decision, it did so by a narrow four-to-three margin, over two forceful dissents. *See Etcheverry v. Tri-Ag Services, Inc.*, 993 P.2d 366 (Cal. 2000). Petitioner believes that the minority position better comports with the text of section 136v, the structure of FIFRA, and Congressional intent. *See* Part B *infra*. For present purposes, however, the question is not which position is correct, but that there is a division among the courts under which state-law damages claims may (or may not) go forward based solely on geographical happenstance. This Court should grant certiorari to establish uniformity on the question presented.

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[3]In *Sleath*, this Court denied review despite the clear conflict in appellate authority. However, as the respondent in *Sleath* had argued, the Montana state courts had not issued a "final judgment" and thus this Court did not have jurisdiction under 28 U.S.C. § 1257(a). *See* Respondent's Brief in Opposition, at 3-11, in *Dow AgroSciences LLC, et al. v. Sleath, et al.*, No. 00-1674 (U.S. filed July 3, 2001).

The need for review is underscored by the position taken by the EPA, which has stated that section 136v(b) does not preempt *any* state-law damages action. The agency has filed *amicus curiae* briefs in private appellate litigation to express its concern that the courts have misinterpreted federal law and regulations and FIFRA's legislative history. The agency's most comprehensive brief — signed by the EPA's general counsel as well as by an Assistant Attorney General — was filed in the *Etcheverry* litigation in California, in which the Justice Department also presented oral argument. *See* Brief *Amicus Curiae* for the United States in Support of Plaintiffs-Appellants, in *Etcheverry v. Tri-Ag Service, Inc.*, No. S072524 (Cal. S. Ct. filed March 1999) (hereafter "U.S. *Etcheverry* Br."). Copies of that brief have been lodged with this Court, as have copies of the EPA/Justice Department brief in a case from the Fifth Circuit, which takes the same position. *See* Brief *Amicus Curiae* for the United States in Support of Appellants in *Hart v. Bayer Corp.*, No. 98-60496 (5th Cir. filed March 1999).

The EPA's *Etcheverry* brief explains why the text, structure, and history of FIFRA do not support preemption of state damages claims and why the EPA has an interest in assuring that the courts do not undermine the ability of state tort systems to provide compensation to growers whose crops have been damaged by pesticides and individuals who have sustained personal injuries from pesticides. U.S. *Etcheverry* Br. at 8-33. The United States summarized its views as follows:

> While the term "requirements" may encompass common law duties in some contexts, the text, legislative history, and purposes of FIFRA demonstrate that Congress had no intent that the use of the term "requirements" in section 136v(b) would extinguish state law damages actions. When section 136v(b) was enacted in

> 1972, state law actions against pesticide manufacturers for failure to warn were a commonplace and uncontroversial feature of the legal landscape. No evidence from the text or legislative history of FIFRA suggests that Congress had any intent to extinguish those actions or that Congress even considered doing so. Indeed, Congress amended FIFRA in 1972 out of increasing concern for human health and the environmental effects of pesticides such as DDT. Given that FIFRA establishes no private damages remedy for those injured by pesticides, it would be astonishing that, without any discussion, Congress would have intended to deprive injured persons of all means of relief.

Id. at 5-6.

The EPA's position is important because this Court has sometimes given weight to an agency's views of the preemptive scope of the statute that it is charged with implementing, both as expressed in agency regulations, *see Medtronic*, 518 U.S. at 496-97; *id.* at 505-06 (opinion of Breyer, J.); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714-15 (1985), and in the form of briefs filed in private litigation. *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 883 (2000); *American Airlines, Inc. v. Wolens*, 513 U.S. 220, 232-34 (1995). The EPA's position is not, of course, dispositive on the merits and should only be accorded the weight that its persuasive power deserves, but it provides a further compelling reason to grant review. The majority view in the lower courts effectively abrogates traditional state damages remedies based on an interpretation of a federal statute that is flatly at odds with the interpretation of the agency authorized by Congress to enforce that statute. That situation

should not persist without this Court's blessing.

2. The courts are also in tension with one another over the scope of FIFRA preemption regarding state-law damages claims premised on duties other than a failure to warn, such as design defect, manufacturing defect, and breach of warranty. Those kinds of claims allege that the pesticide product itself is defective in some way — for instance, that it is unreasonably dangerous because its risks outweigh its benefits or because safer and more effective alternative products were available. Under those theories of liability, the fact that the pesticide was marketed in a defective condition requires the manufacturer to compensate people injured by it, whether or not the product was accompanied by the appropriate warnings. The courts generally have recognized that such claims are not preempted by FIFRA because 7 U.S.C. § 136v(b) concerns only the "labeling or packaging" of pesticides. *See, e.g., National Bank of Commerce v. Dow Chemical Co.*, 165 F.3d 602, 609 (8th Cir. 1999) ("defectively manufactured or designed products properly labeled under FIFRA may still be subject to state regulation in the form of common law or other claims"); *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 564 (1st Cir. 1996) (FIFRA does not expressly preempt design and manufacturing claims); *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1307 (4th Cir. 1992) (FIFRA does not preempt "state-imposed standard of care relating to product design, manufacture, testing, and the like"); *Ackerman v. American Cyanamid Co.*, 586 N.W.2d 208, 215 (Iowa 1998) (FIFRA does not preempt negligent design and testing claims); *Eide v. E.I. Du Pont De Nemours & Co.*, 542 N.W.2d 769, 772 (S.D. 1996) (FIFRA does not preempt defective design, manufacture, and production claims).

Courts have nevertheless held some claims preempted, even if pleaded as defect claims, on the ground that they are "disguised" failure-to-warn claims that, in effect, challenge the

warnings on the product label. *See, e.g., Grenier*, 96 F.3d at 565 (referring to manufacturing and design defect claim as "disguised labeling claim"); *Worm v. American Cyanimid Co.*, 5 F.3d 744, 747-48 (4th Cir. 1993); *Pfeifer v. E.I. Du Pont de Nemours and Co.*, 606 N.W.2d 773, 778 (Neb.), *cert. dismissed*, 530 U.S. 1300 (2000); Pet. App. 8a. In applying that standard, a number of courts, including the Eighth Circuit below, have asked "whether in seeking to avoid liability for any error, would the manufacturer choose to alter the label or the product." Pet. App. 8a (citing *Worm*, 5 F.3d at 747-48); *see also, e.g., Andrus v. AgrEvo USA Co.*, 178 F.3d 395, 399 (5th Cir. 1999); *Didier v. Drexel Chemical Co.*, 938 P.2d 364, 369 (Wash App. 1997) ("the test for preemption is whether a manufacturer, in seeking to avoid liability, would reasonably choose to alter the product or the label").

That is not the proper preemption inquiry for two related reasons. First, when a plaintiff seeks recovery on a product-defect theory, there is no preemption under the plain language of 7 U.S.C. § 136v(b), and the question whether liability should be imposed is solely a matter of state law. For instance, petitioner's first claim for relief alleges that Bovinol "was defectively designed and unreasonably dangerous for its use, in that it exposes users to a foreseeable risk of permanently damaging the user's immune system, including exposing the user to acquiring aplastic anemia." Complaint, ¶ 12. That allegation, which has nothing to do with whether the product was accompanied by appropriate warnings, poses a question solely under state law; it does not raise a preemption issue because it does not challenge the product's "labeling or packaging." Second, the question whether the defendant manufacturer would or would not choose to change its label is irrelevant to the preemption question. To be sure, in response to a jury finding that a pesticide was defectively designed, the manufacturer might include additional warnings on its label,

rather than modifying or ceasing to sell the product (or doing nothing at all), but that does not alter the nature of the plaintiff's claim or the basis of the jury's decision. Both are based solely on the product's defective design.[4]

In contrast to courts that ask whether the defendant would alter its label in response to a finding of liability, other courts look to the underlying nature of the plaintiff's claims and hold that allegations of liability on bases other than a failure to warn are *not* preempted by FIFRA, without asking how the defendant might react to a jury verdict in favor of the plaintiff. *See, e.g., National Bank of Commerce*, 165 F.3d at 609; *Ackerman*, 586 N.W.2d at 214 (noting the *Worm* test, but allowing design and testing claims to go forward if they challenge the production of the production and not its labeling); *Eide*, 542 N.W.2d at 772; *Higgins v. Monsanto Co.*, 862 F.Supp. 751, 757-60 (N.D.N.Y. 1994). A grant of review

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[4]For this reason, the Eighth Circuit's reliance on the testimony of one of petitioner's experts that Bovinol could have been used safely if the label warnings had been appropriate, Pet. App. 9a, is irrelevant to the preemption question, even though it might be relevant as a matter of state law to at least some of petitioner's claims. That same expert also repeatedly stated that the product was defective, in particular because safer and more effective products were available. Dep. of Richard L. Lipsey, Ph.D, at 257-61; *see also* Aff. of Richard L. Lipsey, Ph.D., ¶ 20 (noting that because of dangers of dichlorvos his former company had substituted "more effective and safer pesticide chemicals for the Dichlorvos"). That testimony underscores the fact that petitioner's design-defect claim is not a "disguised" attack on the product's label, *see* Pet. App. 8a, but rather is a claim that the product should not have been marketed at all.

would resolve this confusion in the case law as well.[5]

B. The Decision Below Incorrectly Construes The Scope Of Preemption Under FIFRA.

1. The decision below, like the decisions of most other courts to have addressed the scope of FIFRA preemption, is flawed because it erroneously holds that FIFRA's express preemption provision applies to state-law damages claims. The courts that have found preemption of damages claims under 7 U.S.C. § 136v(b) have relied almost exclusively on a rote application of this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). *Cipollone* held that the word "requirement," as used in the preemption provision of the Public Health Cigarette Smoking Act of 1969, could include common-law claims for damages, including claims for failure to warn. 505 U.S. at 520-24. The courts have erroneously

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[5]The appellate courts are also divided on a related FIFRA preemption question: whether FIFRA preempts a pesticide user's state-law failure-to-warn claim that the product was not effective for its intended use, *e.g.*, a claim by a farmer alleging that a FIFRA-registered pesticide's ineffectiveness resulted in crop damage. *Compare American Cyanamid Company v. Geye*, ___ S.W.3d ___, 2002 WL 1448843 (Tex. June 6, 2002) (no preemption of crop-damage claims because EPA does not review product labels for efficacy and noting conflict); *Kawamata Farms v. United Agri Prods.*, 948 P.2d 1055, 1076-77 (Haw. 1997) (some such claims not preempted and citing other authority), *with Etcheverry*, 993 P.2d 366 (crop-damage claims preempted); *Taylor Ag Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) (same); *see also* U.S. *Etcheverry* Br. at 33-42 (explaining that efficacy claims are not preempted by FIFRA because, among other reasons, EPA does not conduct efficacy review for pesticides). A grant of certiorari here would, if resolved in petitioner's favor, necessarily resolve the conflict in the crop-damage cases.

concluded that this holding — concerning the use of a particular word in one statute enacted by Congress in 1969 — necessarily means that "requirement" as used by Congress in 1972 in FIFRA's preemption provision reaches common-law damages claims. A fair reading of FIFRA's preemption provision, however, reveals that Congress did not intend preemption of damages claims at all. *See* U.S. *Etcheverry* Br. at 9 (acknowledging that in some contexts "'requirements' may encompass obligations imposed through common law damages actions[,]" and explaining that the "text, legislative history, and purposes of FIFRA demonstrate, however, that, as it is used in section 136v(b), the term 'requirements' means direct commands imposed by law regarding the contents of labels [and] does not include state damages actions"); *see also Lee v. Madigan*, 358 U.S. 228, 231 (1959) ("Only mischief can result if those terms [appearing in different statutes] are given one meaning regardless of the statutory context.").

In *Cipollone*, the statute at issue set forth the specific warning to be included on each label, that is, *Congress itself drafted the required warning language. See* 15 U.S.C. § 1333 (stating exact warnings to appear on cigarette packages and advertisements). It was Congress' very specific and unusual action — and only that specific action — that the preemption provision sought to protect from conflicting state regulation. Congress had dictated the warnings, and thus the Act preempted challenges to the adequacy of those warnings.

By contrast, with regard to preemption under FIFRA, petitioner's common-law claims in no way challenge a congressional determination, or even an agency determination, that the label should state certain cautionary language and no other. Quite the contrary, the label is drafted by the *registrant*, *i.e.*, the pesticide manufacturer. Although FIFRA specifies warning "signal words" and precautionary statements for certain

toxicity categories, those warnings have nothing to do with the types of warnings that might have prevented petitioner's injuries here: for instance, that the product not be used on horses or that it not be applied with a spray bottle. And even where specific warnings are required, pesticide manufacturers must include additional warnings or cautionary statements on the labels as are needed to adequately protect health and the environment. 7 U.S.C. § 136(q)(1)(F), (G); 40 C.F.R. §§ 156.10(a)(1); 156.10(i)(1)(i). Whether or not one of the specific toxicity warnings is required, the label must state "[a]ny limitations or restrictions on use to prevent unreasonable adverse effects." 40 C.F.R. § 156.10(i)(2)(x). FIFRA places full responsibility on the manufacturer to provide adequate warnings and directions for use on its product's label. 7 U.S.C. § 136a(c)(5). FIFRA prescribes only general requirements for pesticide labels and leaves it to the manufacturer to devise a label that will adequately protect against adverse effects, including damage to people, animals, and crops. *Id.* §§ 136(j), 136a(c)(5); 40 C.F.R. § 156.10(i)(2)(iii),(vi),(vii),(x). If a registrant learns of inadequacies in the label after the EPA has registered its pesticide, the registrant must promptly inform the EPA of the inadequacies and revise its label to provide adequate warnings and directions for use. 7 U.S.C. § 136a(f)(1). Accordingly, respondent was not only free at any time to provide information to purchasers and users that would have enabled petitioner to avoid injury, it was obligated under FIFRA to do so.

Indeed, one manifestation of FIFRA's registrant-driven scheme of labeling, as EPA has acknowledged, is that, "[f]or liability reasons, companies often voluntarily provide additional information on the label, particularly in the area of precautionary statements." 49 Fed. Reg. 37,960, 37,971 (Sept. 26, 1984). The understanding that the federal regulatory system and state-law tort compensation would co-exist makes sense in

the FIFRA context where registrants draft pesticide labels and are subject to general, continuing duties to provide adequate warnings.

2. The legislative history of the provision at issue in *Cipollone* and the one at issue here also differ dramatically. In *Cipollone*, the Court focused on a comparison of the 1969 preemption provision with its predecessor from the 1965 Cigarette Act. 505 U.S. at 520-23. Whereas the 1965 version preempted only "statements," the 1969 version preempted "requirements or prohibitions." The Court determined that the change in language must have some significance, and, on that basis, found that common-law claims could come within the scope of the preemption provision of the 1969 Act. 505 U.S. at 522-23. The Court's opinion makes clear that the dispositive factor was the contrast between the 1965 and 1969 provisions, not simply the use of the word "requirement" in the 1969 provision. Indeed, although the 1965 Act preempted any "statement relating to smoking and health . . . *required*" in cigarette advertising, the Court held that it did not preempt *any* common-law claims. *Id.* at 518-20.

Here, in contrast, the legislative history of FIFRA provides no evidence that Congress intended to preempt state damages actions. Aside from technical changes, section 136v(b) has not been amended since its enactment in 1972 and nothing analogous to the interpretive guide provided by the amendments to the 1965 Cigarette Act is present in the history of section 136v(b). Furthermore, FIFRA's extensive legislative history does not mention preemption of state damages claims. *See, e.g.*, S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993; *see also* U.S. *Etcheverry* Br. at 22-31 (explaining that FIFRA's legislative history involving 25 days of hearings and numerous committee reports does not even hint at intent to preempt any state damages

actions). As the United States has noted, the conclusion that Congress did not enact "tort reform" in 1972 is underscored by the fact that, in nearly a century of case law prior to FIFRA's passage, the courts uniformly held that pesticide manufacturers had a duty to warn under state law. *Id.* at 19-22.

3. Another fundamental problem with the lower courts' FIFRA preemption analyses premised on *Cipollone* is that they overlook the placement of subsection 136v(b). That provision is part of a section entitled "Authority of States," which begins with an *anti*-preemption clause:

> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only to the extent the regulation does not permit any sale or use prohibited by this subchapter.

7 U.S.C. § 136v(a). The preemption clause, which follows immediately, 7 U.S.C. § 136v(b), begins with the words "Such State," thus tying the preemption provision to the activities of the state discussed in section 136v(a), quoted above. Section 136v(a) addresses states' general authority to "regulate" the sale and use of pesticides, *not* the states' authority to award compensation through damages remedies. As this Court has stated, the use of the word "regulate" refers not to common-law damages remedies, but rather to positive-law enactments of legislative and regulatory bodies. *See Cipollone*, 505 U.S. at 519, 523 (in 1965 Cigarette Act, "'regulation' most naturally refers to positive enactments" of legislatures and agencies, "not to common-law damages actions"). It follows, therefore, from the structure and wording of section 136v, that subsection (b) also does not encompass damages liability because it refers to states only in their regulatory, not adjudicatory, capacity.

This conclusion is consistent with other decisions of this Court, which have noted that Congress can, and does, rationally distinguish state positive law and common law, preempting the former but not the latter. *See Cipollone*, 505 U.S. at 518 ("there is no general, inherent conflict between [express] federal preemption of state [regulatory] warning requirements and the continued vitality of state common-law damages actions"); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) ("The effects of direct regulation ... are significantly more intrusive than the incidental effects of such an award provision. ...Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (despite federal preemption of state regulatory authority, state-law punitive damages awards not preempted even though "regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards").

In addition, section 136v(a) prohibits states only from permitting a sale or use prohibited by FIFRA. In other words, it does not restrict states' authority to impose restrictions in addition to those imposed by FIFRA. Subsection (a) thus allows a state to require manufacturers to comply with state requirements in addition to the federal requirements before they may market their products in that state. For example, a state could, consistent with both sections 136v(a) and (b), ban a registered pesticide from sale in that state — an act quite drastic in comparison to providing a tort remedy. *See* S. Rep. No. 92-970, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4092, 4111-12 ("Local governments could, however, prohibit or restrict the sale or use of pesticides within their jurisdiction."). Indeed, states have done so. *See, e.g.*, Iowa Code Ann. § 206.32 (banning sale, purchase, application, and use of chlordane); Md. Agric. Code § 5-210.5 (restricting

use of various pesticides). A state could require that pesticide manufacturers submit results of safety and efficacy testing to a state environmental agency. Or a state could require that pesticide manufacturers include warnings about risks to people or the environment in any advertising within that state.

Indeed, a state could require that manufacturers, as a condition to marketing in that state, compensate consumers for damage to people, land, or crops caused by their products. The state could do so without imposing any requirement on product labels. Such a requirement would reflect a state's decision that, "if it must abide by EPA's determination that a label is adequate, [the state] will nonetheless require manufacturers to bear the risk of any injuries that could have been prevented had [the state] been allowed to require a more detailed label or had [the company] persuaded EPA that a more comprehensive label was needed." *Ferebee*, 736 F.2d at 1541. Or the state might decide, based on the principle of strict liability, that manufacturers should be held liable for damage caused by their products, without regard to fault. Under either rationale, a plaintiff's verdict would not require the manufacturer to change its label. It would only require, consistent with subsection (a)'s grant of authority to states to regulate pesticide "use," that the manufacturer pay damages associated with the use of its product. The federal labeling requirements and the state use requirement would not conflict, and the state requirement would not run afoul of section 136v(b)'s proscription against "any requirements for labeling or packaging in addition to or different from those required" under FIFRA.

4. Even if it could be said that the state-law "requirements" referred to in section 136v(b) encompass duties that give rise to liability for damages, section 136v(b) would not preempt petitioner's claims because those claims would not be based on duties in addition to or different from the duties

imposed by FIFRA. As discussed above, FIFRA requires pesticide registrants to ensure that their labels and directions for use are adequate to protect against unreasonable adverse effects to health and the environment. 7 U.S.C. § 136a(c)(5). Pesticides that lack adequate warning labels are misbranded, even if EPA has approved the label. *Id.* §§ 136(q)(1)(G), 136a(f)(2).

Petitioner alleges that respondent "failed to adequately warn the user of the dangerous characteristics" of Bovinol. Complaint, ¶ 15. Minnesota common law requires that sellers provide adequate instructions for safe use and warn of dangers inherent in improper use of the product. *See, e.g., Frey v. Montgomery Ward & Co.*, 258 N.W. 2d 782, 787 (Minn. 1977); *see also* 4A Michael K. Steenson & Peter B. Knapp, *Minnesota Practice*, CIVJIG 75.25, at 126-34 (4th ed. 1999) (standard jury instruction on duty to warn). The common-law duties on which those allegations were based thus mimic the manufacturer's duties under FIFRA, which places the burden of testing, identifying, and labeling as to risks to people and the environment on the registrant. To the extent that the claims alleged here are based on duties that parallel requirements imposed under FIFRA, *see Medtronic*, 518 U.S. at 496-97, they are not "in addition to or different from" FIFRA's requirements and, thus, are not preempted.

This conclusion is consistent with the Court's analysis in *Medtronic*. Looking to the general language of the preemption provision of the federal Medical Device Amendments ("MDA"), 21 U.S.C. § 360k(a) — which is similar to the language of 7 U.S.C. § 136v(b) — the Court identified an "overarching concern that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest." *Medtronic*, 518 U.S. at 500. More specifically, in considering negligent manufacturing and failure-

to-warn claims, *Medtronic* made "a careful comparison between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute and regulations." *Id.* at 500. The Court concluded that the *federal* manufacturing and labeling requirements were "important but entirely generic" regulatory concerns, not the type of concerns that section 360k(a) was designed to protect from potentially contradictory state requirements. Similarly, the *state* common-law duties at issue in *Medtronic* were general duties, not developed specifically with respect to devices. Thus, the Court found that those duties were not the kind of requirements that Congress or the FDA feared might impede the FDA's implementation and enforcement of the MDA. *Id.* at 500-01.

Like the good manufacturing requirements and general labeling requirements at issue in *Medtronic*, FIFRA's labeling requirements are general. (Indeed, the FDA's good manufacturing requirements are more comprehensive than the EPA's labeling regulations, *see* 21 C.F.R. Part 820, yet *Medtronic* found that the MDA did not preempt manufacturing claims.) The registrant, not the EPA, devises a label in accordance with FIFRA's general standards. And, as noted earlier, in contrast to the statutorily prescribed warnings of the 1969 Cigarette Act, *see Cipollone* 505 U.S. at 508, pesticide registrants are obliged under FIFRA to update their labels to protect against adverse health and environmental effects. *See* 7 U.S.C. § 136d(a)(2).

5. Even if section 136v(b) preempts common-law claims challenging the adequacy of a pesticide's label, it does not preempt failure-to-warn claims based on the theory that a defendant should have warned through means other than labeling. This conclusion follows directly from the language of section 136v(b), which only preempts state requirements "for

labeling or packaging," and from the Court's ruling in *Cipollone*.

The 1969 Act at issue in *Cipollone* preempted state-law requirements "with respect to advertising or promotion." 15 U.S.C. § 1334(b). *Cipollone* held that, although the 1969 Act preempts failure-to-warn claims based on advertising or promotion, claims based on the theory that the defendants should have warned through other means were not preempted. 505 U.S. at 524-25 (failure-to-warn claim not preempted to extent based on "actions unrelated to advertising or promotion").

Under FIFRA, "labeling" does not include oral statements, point-of-sale signs or pamphlets, or advertising and promotional material. *See* 7 U.S.C. § 136(p) (defining "label" and "labeling").[6] Thus, consistent with *Cipollone*, petitioner's claims cannot be preempted to the extent that they challenge respondent's failure to advise about the risks of Bovinol

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[6]7 U.S.C. § 136(p), provides in full:

Label and labeling.—

(1) Label.—The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling.—The term "labeling" means all labels and all other written, printed, or graphic matter—

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United State Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

through non-label means. That conclusion is consistent with decisions of two circuits that have held that even direct state regulation of communications by pesticide manufacturers are not preempted by section 136v(b) where the state regulations affirmatively require communications by means other than labeling. *See Chemical Specialties Manufacturers Ass'n v. Allenby*, 958 F.2d 941, 946 (9th Cir.) ("labeling" under FIFRA does not include point-of-sale signs required under California's Proposition 65), *cert. denied,* 506 U.S. 825 (1992); *New York State Pesticide Coalition v. Jorling,* 874 F.2d 115, 119 (2d Cir. 1989) ("labeling" under FIFRA does not include posting of signs to warn of impending use of dangerous chemicals, required by New York law). *Contra Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993). The decision below is erroneous for this reason as well.[7]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[7]For the reasons stated above (at 16-17), the court below also erred in granting summary judgment as to petitioner's product-defect claims.

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August 9, 2002

United States Court of Appeals
for the Eighth Circuit

No. 01-2182

Kim Netland,
Appellant,

v.

Hess & Clark, Inc.,
Appellee.

Appeal from the United States
District Court for the
District of Minnesota.

Submitted: December 14, 2001
Filed: March 26, 2002

Before McMILLIAN, JOHN R. GIBSON, and MAGILL, Circuit Judges.

MAGILL, Circuit Judge.

Kim Netland brings this action against Hess & Clark, Inc. ("Hess"), the manufacturer of the pesticide KenAg Bovinol

("Bovinol"), claiming damages for injury resulting from Netland's use of Bovinol on his horses. The district court[1] granted Hess's motion for summary judgment holding that Netland's claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 et seq., because they are an impermissible challenge to Bovinol's label. For the reasons stated below, we affirm.

I.

Netland, in the summer of 1994, following his junior year of high school, used Bovinol to control flies on his family's three horses. Margaret Netland, Netland's mother, purchased the pesticide in June 1994, from a local retail feed store for the purpose of minimizing the risk of injury to Netland from the unpredictable behavior of horses due to the annoyance of flies. The sales clerk informed Mrs. Netland that the pesticide would work for horses. Prior to giving Netland the pesticide, Mrs. Netland read the warning label and wore plastic gloves to pour the pesticide into a bathroom cleaner spray bottle. Thereafter, Netland sprayed the pesticide on his horses three to four times a week over a six-week period. Prior to riding, Netland sprayed each horse with eight to ten squirts of the pesticide and would normally ride the horse within a minute after spraying it with the pesticide. Netland did not wear any protective clothing or equipment when he used the pesticide and did not read the Bovinol label. Netland believes that he got the pesticide on his skin by touching the horses because his clothes were damp after riding.

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[1]The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

In mid-August 1994, Netland began high school football practice and began to experience fatigue and bruising. On September 28, 1994, Netland collapsed on his way to school and was taken to his family physician, Dr. Thabes. Realizing that Netland had a severe blood problem, Dr. Thabes transferred Netland to a hematologist in Fargo, North Dakota, where he was diagnosed with acquired aplastic anemia.[2] Over the next year, Netland's treatment consisted of large doses of steroids and approximately thirty-five blood transfusions. As a result of this treatment, one of Netland's hips failed and was replaced with a prosthesis. Netland's other hip is also at risk.

Bovinol is a registered insecticide with the Environmental Protection Agency ("EPA") under FIFRA and carries an EPA-approved label. Dichlorvos ("DDVP"), the active ingredient in Bovinol, is an organophosphate, which is absorbed into the human body by ingestion, inhalation, and skin absorption. The Bovinol label describes the approved and lawful uses of the pesticide, including use on cattle, in animal buildings (horse barns, shelter sheds, dairy barns, milk sheds), in poultry houses, dog kennels, and outdoor uses (picnic grounds, loading docks, outdoor latrines, parking areas, refuse areas, around service stations, open-air drive-ins, outdoor ice cream stands, and garbage collection and disposal areas). The label does not expressly state that Bovinol may be used on horses. The Bovinol label also contains a precautionary

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[2]Aplastic anemia is an anemia characterized by defective function of the bone marrow, such that there is a failure to properly form all types of blood cells.

instruction and warning.[3]

On July 1, 1999, Netland filed a three-count complaint against Hess alleging (1) strict liability in that Bovinol was

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[3]Specifically, the warning contained on the Bovinol label states:

PRECAUTIONARY STATEMENTS
HAZARDOUS TO HUMANS
AND DOMESTIC ANIMALS
WARNING

May be fatal if swallowed, inhaled or absorbed through the skin or eyes. Rapidly absorbed through skin and eyes. Do not get into eyes, on skin or on clothing. Do not breathe vapor or spray mist. Wash thoroughly with soap and water after handling and before eating or smoking. Do not contaminate feed, water, foodstuffs, milk or milking utensils. Wear clean natural rubber gloves, protective clothing, and goggles, faceshield or equivalent. Wear a pesticide respirator jointly approved by the Mining Enforcement and Safety Administration (MESA) and the National Institute for Occupational Safety and Health (NIOSH) under the provisions of 30 CFR Part 11. Wear impervious footwear or protective covers as shoes, boots and other articles made of leather or similar porous materials may be dangerously contaminated.

defectively designed and unreasonably dangerous, (2) failure to warn users of the dangerous characteristics inherent in the Bovinol product, and (3) negligence and breach of warranty in that Hess failed to use reasonable care in the design, manufacture, and sale of Bovinol. On January 19, 2001, Hess moved for summary judgment asserting federal preemption under FIFRA and also that Netland failed to offer admissible proof of causation. Hess also filed a motion to exclude the opinion testimony of several of Netland's expert witnesses.

The district court granted Hess's motion for summary judgment without reaching the issue of causation or the admissibility of the testimony of Netland's expert witnesses. In particular, the district court found that each of Netland's claims is essentially an attack on Bovinol's EPA-approved label, and therefore is preempted by FIFRA. Netland v. Hess & Clark, Inc., 140 F. Supp. 2d 1011, 1017-19 (D. Minn. 2001). Netland timely appealed.

II.

A grant of summary judgment is reviewed de novo. Nat'l Bank of Commerce v. Dow Chem. Co., 165 F.3d 602, 606 (8th Cir. 1999). Summary judgment is appropriate if, after viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party, here Netland, the record demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Id. See also Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In addition, preemption is a question of law reviewed de novo. Nat'l Bank, 165 F.3d at 607.

A.

Under FIFRA, all pesticides sold in the United States must be registered with the EPA. See 7 U.S.C. § 136a(a) (1994). When applying for registration, manufacturers must submit draft label language addressing a number of topics

including ingredients, directions for use, and any information of which they "are aware regarding unreasonable adverse effects of the pesticide on man or the environment." 40 C.F.R. § 152.50(f)(3) (2001). Prior to registering a pesticide, the EPA must find that its labeling complies with FIFRA's requirements, such as a determination that the pesticide is not misbranded, and that when the pesticide is used in accordance with its labeling that it will perform its intended function without and unreasonable adverse effect on the environment. See 7 U.S.C. § 136a(c)(5) (1994). Finally, FIFRA contains an express preemption clause, which provides that a state "shall not impose or continue in effect any requirements for labeling . . . in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b) (1994).

In National Bank, we held that once a label is approved, FIFRA expressly provides a defense, arising from preemption, against certain state law claims. 165 F.3d at 608. Specifically, we held that FIFRA preempts state common law claims for "'inadequate labeling or failure to warn.'" Id. (quoting Bice v. Leslie's Poolmart, Inc., 39 F.3d 887, 888 (8th Cir. 1994)). Moreover, we stated:

> It is immaterial whether an inadequate labeling or failure to warn claim is brought under a negligence or products liability theory. If a state law claim is premised on inadequate labeling or a failure to warn, the impact of allowing the claim would be to impose an additional or different requirement for the label or packaging.

Id. (footnote omitted). Common law claims for breach of express warranty also are preempted by FIFRA. Id. (citing Welchert v. Am. Cyanamid, Inc., 59 F.3d 69, 73 (8th Cir. 1995)).

Netland concedes that our decision in National Bank preempts his state law claims based on labeling or packaging requirements in addition to or different from those required

under FIFRA. Nevertheless, Netland asks us to revisit our prior decisions insofar as they hold that state law claims based on failure to warn are preempted by FIFRA. Netland maintains that a revisiting is necessitated by the Supreme Court's decision in Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), and an amicus curiae brief submitted by the United States Department of Justice, representing the EPA, filed in Etcheverry v. Tri-Ag Serv., Inc., 993 P.2d 366 (Cal. 2000), which articulated the government's position that FIFRA does not preempt any state law theories of liability, including failure to warn claims that implicate pesticide labels. In addition, Netland draws our attention to two recent state court decisions finding failure to warn claims not preempted in light of these recent developments. See Sleath v. W. Mont Home Health Servs., Inc., 16 P.3d 1042, 1053 (Mont. 2000); Brown v. Chas. H. Lilly Co., 985 P.2d 846, 853 (Ore. 1999). The law is well established, however, that this court may not overrule one of its prior decisions unless it does so en banc. Minn. Citizens Concerned for Life v. FEC, 113 F.3d 129, 131 (8th Cir. 1997). Thus, until modified or overruled by the court en banc, National Bank is the law of this circuit. Accordingly, Netland's failure to warn and breach of warranty claims are preempted by FIFRA.[4]

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[4]At least two of our sister circuits have concluded that the established interpretation of the FIFRA preemption clause is unchanged by the Supreme Court's decision in Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996). See, e.g., Grenier v. Vt. Log Bldgs., Inc., 96 F.3d 559, 563 (1st Cir. 1996) ("It . . . is now settled by the Supreme Court in Cipollone [v. Liggett Group, Inc., 505 U.S. 504 (1992)] and Lohr, that 'requirements' in this context presumptively includes state causes of action as well as laws and regulations."); Hawkins v. Leslie's Pool Mart, Inc., 184 F.3d 244, 250 (3d Cir. 1999) ("even assuming that FIFRA is analogous to the [MDA] addressed by the Supreme Court in Medtronic, contrary to [plaintiff's] assertions, we do not read that case as standing for the overarching premise that tort claims fall outside 'preempted requirements'.").

B.

Next, Netland contends that his claims alleging strict liability and negligence fall outside the state law causes of action that are preempted by FIFRA. He argues that FIFRA preempts only state law claims that directly challenge the product label; therefore, FIFRA does not preempt his claims that Bovinol was defectively designed and unreasonably dangerous. The district court disagreed because it concluded that Netland failed to produce any evidence of errors in the manufacture of Bovinol other than the adequacy of the warning. Netland, 140 F. Supp. 2d at 1017. Moreover, the district court found that Netland's liability expert, Dr. Lipsey, testified that Bovinol is safe if properly used and distributed with appropriate labeling, and therefore, Netland failed to produce any evidence demonstrating that Bovinol is unreasonably dangerous. Id. at 1017-18. Thus, the district court concluded that Netland's claims alleging strict liability and negligence were nothing more than a challenge to Bovinol's label for failure to warn against using the pesticide on horses before riding them. Id. at 1017-19.

On appeal, Netland argues that the district court's decision was in error because his complaint asserts a claim for defective design, and therefore is not preempted by FIFRA. We agree with Netland that defectively manufactured or designed products properly labeled under FIFRA remain subject to state regulation, in the form of common law or other claims. Nevertheless, "if the state law claim is premised on inadequate labeling or a failure to warn," which results in the imposition of additional or different labeling requirements, the claim is nonetheless preempted regardless of the guise under which the claim is presented. Nat'l Bank, 165 F.3d at 608. Thus, our task is to determine whether Netland's claims are essentially a challenge to Bovinol's label or the overall design of the pesticide. To guide our analysis, we must ask whether in seeking to avoid liability for any error, would the manufacturer choose to alter the label or the product. See Worm v. Am. Cyanamid Co., 5 F.3d 744, 747-48 (4th Cir. 1993) (line between mislabeling and defective design may not always be

clear but may be resolved by asking whether manufacturer would alter the product or the label). After careful review of the entire record, we agree with the district court and hold that Netland's claims are preempted by FIFRA because they are an impermissible challenge to the pesticide's label.

Netland contends that his claim is not preempted based on Dr. Lipsey's expert testimony that Bovinol was defectively designed and unreasonably dangerous because it contained DDVP as one of the active ingredients in its formula. In particular, Netland asserts that Dr. Lipsey testified that a safer and more effective alternative exists to DDVP, that being pyrethrum. We disagree with Netland's characterization of Dr. Lipsey's testimony. Dr. Lipsey did not testify that the inclusion of DDVP makes Bovinol defective or unreasonably dangerous. In fact, Dr. Lipsey testified that Bovinol is an EPA-registered and approved product that can be safely used under appropriate circumstances. Dr. Lipsey's testimony merely indicated that Dr. Lipsey personally sprays his horses prior to riding them with pyrethrum, that he personally recommends pyrethrum for horses, and that most people use pyrethrum for horses. It is illogical to conclude that Bovinol is defectively designed or unreasonably dangerous because a substitute product might be the preferred pesticide for horses.

Dr. Lipsey's remaining complaints with Bovinol all directly challenge the pesticide's label. First, Dr. Lipsey stated "[a] prudent manufacturer would have put the fact that [Bovinol] can affect bone marrow; that this . . . can cause leukemia [on the label]."[5] Dr. Lipsey's second complaint is that the label is not specific about the parameters of using the product on horses. In particular, Dr. Lipsey testified, "[the label does not say] 'Do not apply to horses.' They said okay to horse

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[5]Elaborating on this point, Dr. Lipsey further testified that the label should include information about chronic health effects so that the user could decide whether they wanted to use it and could handle it in a safe manner.

barns and okay to pests that get on horses, but they didn't exclude horses, so you can assume that you can apply it to horses." Dr. Lipsey's final complaint with Bovinol also concerns the pesticide's label, but in this instance, he opines that the label's instructions to the user to use personal protective equipment is "overkill," and the label should merely state "avoid breathing the vapors" or "avoid getting it on your skin." While Dr. Lipsey's complaints with Bovinol may indeed create genuine issues of fact, they nonetheless are insufficient to avoid summary judgment because they fail to offer any evidence of a design defect unrelated to the label. Thus, Netland's claims are preempted by FIFRA.

III.

Because we find that the premise of each of Netland's claims is Bovinol's label and is therefore preempted by FIFRA, we affirm the well-reasoned and thorough opinion of the district court granting summary judgment in favor of Hess.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States District Court,
D. Minnesota.

Kim NETLAND, Plaintiff,

v.

HESS & CLARK, INC., Defendant.

No. CIV.99-1032 ADM/RLE.

April 16, 2001.

MEMORANDUM OPINION AND ORDER

MONTGOMERY, District Judge.

I. INTRODUCTION

On February 1, 2001, the undersigned United States District Judge heard Defendant Hess & Clark's Motion for Summary Judgment [Doc. No. 31]. Defendant seeks summary judgment on Plaintiff Kim Netland's claims for: (1) "strict liability"; (2) "failure to warn"; and (3) "negligence and breach of warranty." Compl. ¶¶ 12, 15, 18. Defendant argues that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*, preempts all common law actions against manufacturers of EPA-registered pesticides that are based upon claims directly or indirectly relating to labeling, including any failure to warn theory. For the reasons set forth below, Defendant's motion is granted.

II. BACKGROUND[1]

Plaintiff Kim Netland ("Netland") alleges that he developed aplastic anemia after using Defendant Hess & Clark's ("Defendant") insecticide product, KenAg Bovinol ("Bovinol"),[2] to spray his horses. Defendant's Statement of Material Undisputed Facts ("SMF") ¶¶ 12-18, 24-26. Bovinol is an organophosphate insecticide, registered with the United States Environmental Protection Agency ("EPA"). SMF ¶¶ 5-11. The product label describes all of its approved uses, none of which include use on horses. SMF ¶¶ 19-21. Under FIFRA, it is a violation of federal law to use a pesticide product in a manner inconsistent with its labeling. *See* 7 U.S.C. § 136(ee). The Bovinol label lists various warnings and precautions, including instructions to use specific personal protective gear when spraying Bovinol. SMF ¶ 22. Part of the label reads:

> **Hazardous to Humans and Domestic Animals**
> **Warning**
> May be fatal if swallowed, inhaled or absorbed through the skin or eyes. Rapidly absorbed through skin and eyes. Do not get into eyes, on

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[1] In passing on a motion for summary judgment, the court must review the facts in the light most favorable to the party opposing the motion, and must give that party the benefit of all reasonable inferences to be drawn from the evidence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

[2] Bovinol's active ingredient is Dichlorvos, also known as DDVP or Vapona. SMF ¶ 4.

> skin or on clothing. Do not breathe vapor or spray mist. Wash thoroughly with soap and water after handling and before eating or smoking. Do not contaminate feed, water, foodstuffs, milk or milking utensils.
> Wear clean natural rubber gloves, protective clothing, and goggles, faceshield or equivalent. Wear a pesticide respirator jointly approved by the Mining Enforcement and Safety Administration (MESA) and the National Institute for Occupational Safety and Health (NIOSH) under the provisions of 30 C.F.R. Part 11. Wear impervious footwear or protective covers as shoes, boots and other articles made of leather or similar porous materials may be dangerously contaminated.

Bovinol Label, SMF ¶ 22.

In June 1994, Margaret Netland, Netland's mother, purchased Bovinol from a Bagley, Minnesota retailer, Marty Brothers. SMF ¶ 12. Margaret Netland purchased Bovinol for her son's use in keeping flies away from his horses. SMF ¶ ¶ 12-13. She was concerned about the risk of injury to Netland if the horses reacted unpredictably to the flies. M. Netland Dep., at 71. After reading the label, Margaret Netland, using plastic gloves for protection, poured the Bovinol into a "Lysol Basin, Tub & Tile" cleaner spray bottle. SMF ¶ ¶ 15-17. She kept the spray bottle next to the large container of Bovinol in the barn and told Netland to use the spray in the bottle. *Id.* Margaret Netland refilled the spray bottle at least once, if not twice. M. Netland Dep., at 73. Netland admits he did not read the Bovinol label. SMF ¶ 23.

Netland alleges that he used Bovinol approximately three to four times per week for a period of approximately six weeks in the summer of 1994. SMF ¶ 24. During each use, Netland testified that he sprayed one or two horses, with eight to ten squirts from the spray bottle for each horse. *Id.* Netland rode the horses within minutes after spraying them. Netland believes Bovinol contacted his skin as a result of his touching the horses and the fact that his clothing was damp with Bovinol after riding the horses. *See* K. Netland Dep., at 87-92, 94.

In late August and September of 1994, Netland began feeling more fatigued each week. *Id.* at 123-24. On September 28, 1994, Netland collapsed and was taken to his family physician, Dr. Thabes, who referred him to a hematologist, Dr. Kobrinsky. *See* Thabes Dep., at 18, 28, 41. Netland was diagnosed with acquired aplastic anemia.[3] SMF ¶ 25.

Netland's Complaint alleges theories of "strict liability," "failure to warn," and "negligence and breach of implied warranty." Compl. ¶¶ 12, 15, 18. Netland's liability expert is Dr. Richard L. Lipsey. SMF ¶ 37. Dr. Lipsey opined "the only possible cause of [Netland's] aplastic anemia has to be the [Bovinol] product. Because he had a strong spatial correlation [sic]. He was there, he used it, he had no protective equipment." SMF ¶ 45. Dr. Lipsey testified that the Bovinol's label was insufficient and that a prudent manufacturer should have warned users to "avoid breathing the vapors," and "avoid getting it on your skin." SMF ¶ 57. Dr. Lipsey further testified that Bovinol is safe as long as it is used

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[3] Aplastic anemia is an anemia characterized by defective function of the bone marrow, such that there is a failure to properly form all types of blood cells.

properly and is distributed with appropriate warnings so that the user avoids breathing the spray mist. SMF ¶¶ 56-61.

III. DISCUSSION

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall issue "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A genuine issue of material fact does not exist "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The movant has the burden of showing that no genuine issue of material fact exists. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Once the movant meets its Rule 56(c) burden, the non-movant "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When weighing the evidence offered by the parties on a motion for summary judgment, this Court must review the evidence and all inferences drawn from that evidence in the light most favorable to the party opposing the motion. *See Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348. The nonmovant, however, "must do more than simply show

that there is some metaphysical doubt as to the material facts." *Id.* at 586, 106 S.Ct. 1348.

B. Preemption

Preemption is based on the Supremacy Clause of Article VI of the United States Constitution. U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."). The Supremacy Clause invalidates state laws that interfere with or are contrary to federal law. *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 604, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991); *Hillsborough County v. Automated Medical Labs., Inc.,* 471 U.S. 707, 712, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985); *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). Such state laws may include legislative enactments and executive pronouncements, i.e. positive law, as well as common law claims recognized by state courts. *See Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 521-22, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).[4] Given Congress' power to preempt state laws with federal regulation, the question is whether Congress

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[4] The plurality's judgment in *Cipollone* has been embraced fully by the Supreme Court. *See CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993); *Freightliner Corp. v. Myrick,* 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) (acknowledging the possibility that tort claims may be impliedly preempted even if not expressly preempted under an applicable statutory provision).

intended such federal regulation to supercede state laws. "Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Cipollone,* 505 U.S. at 516, 112 S.Ct. 2608. In the case at hand, FIFRA contains an express preemption clause. *See* 7 U.S.C. § 136v(b).

FIFRA creates a comprehensive scheme for the regulation of the sale, labeling, packaging, and use of pesticides. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 991-92, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984); *Welchert v. American Cyanamid, Inc.,* 59 F.3d 69, 71 (8th Cir.1995). FIFRA requires that all pesticides to be sold and distributed in the United States must be registered with the EPA. *See* 7 U.S.C. § 136a(a). FIFRA establishes a complex process of EPA review that results in the approval of a pesticide label under which the product may be marketed. *Welchert,* 59 F.3d at 71. Manufacturers must propose draft label language addressing a various number of topics, including ingredients, directions for use, and adverse effects. *Id.;* 7 U.S.C. § 136a(c). The EPA's rules and regulations set forth specific labeling requirements. *See* 40 C.F.R. § 156.10. The final label must be approved by the EPA prior to registration. *See* 40 C.F.R. § 156.10(a)(6).

Under FIFRA, the EPA may not register a pesticide or approve its labeling unless, *inter alia,* it finds that the product "will perform its intended function without unreasonable adverse effects on the environment [and] when used in accordance with widespread and commonly recognized practice, it will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5). As defined in FIFRA, the term "environment" includes "water, air, land, and all plants *and man* and other animals living therein." 7 U.S.C. § 136(j) (emphasis added). Thus, the EPA must conclude that

the product and its labeling are satisfactory to protect human safety when the product is used in accordance with the approved directions for use on the label.

Once a label is approved, FIFRA expressly provides for a defense, based upon preemption, against certain state law claims. *National Bank of Commerce v. Dow Chemical Co.*, 165 F.3d 602, 608 (8th Cir.1999). The preemptive provision of FIFRA states:

> § 136v. Authority of States
> (a) In general
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
> (b) Uniformity
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v.

Thus, FIFRA expressly preempts state imposed requirements in the areas of labeling and packaging that are "in addition to or different from those required" by the EPA. 7 U.S.C. § 136v(b). The term "requirements" in § 136v includes not only state statutory law but also state common-law damages claims. *See Medtronic*, 518 U.S. at 487-88, 116 S.Ct. 2240; *Cipollone*, 505 U.S. at 521, 112 S.Ct. 2608 (concluding that the term "requirements" sweeps broadly and "easily encompass[es] obligations that take the form of common-law rules" and that an award of damages can be " 'a potent method of governing conduct and controlling policy' " (quoting *San*

Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959))). The legislative history confirms that Congress intended § 136v(b) to completely preempt state law with regard to labeling and packaging. *See* H.R. Rep. 92-511, 92d Cong., 1st Sess. 16 (1971). Indeed, it was Congress' intent that § 136v(b) preempt "any State labeling or packaging requirements differing from such requirements under the Act." S. Rep. 92-838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. at 4021. At all times relevant to this case, the parties agree that the Bovinol product was properly registered with the EPA pursuant to FIFRA and carried the label approved by the EPA. SMF ¶ 11.

1. "Failure to warn" claim

Netland alleges a failure to warn claim. State common law claims for "inadequate labeling" or "failure to warn" are preempted by FIFRA. *National Bank of Commerce*, 165 F.3d at 608. "It is immaterial whether an inadequate labeling or failure to warn claim is brought under a negligence or products liability theory." *Id.* Such claims attempt to impose liability for the lack of warning labels "in addition to or different from those required" by the EPA. *See Welchert*, 59 F.3d at 73 ("Where Congress has so clearly put pesticide labeling regulation in the hands of the EPA, [a] claim challenging the accuracy of the [pesticide] label's federally-mandated and approved statement cannot survive. To hold otherwise would be to allow state courts to sit, in effect, as super-EPA review boards that could question the adequacy of the EPA's determination of whether a pesticide registrant successfully complied with the specific labeling requirements of its own regulations. In such case, state court consideration of the label statement would be an 'additional' requirement.") (internal citations omitted). Netland's failure to warn claim is preempted by FIFRA.

2. "Negligence and breach of warranty" claim

Netland claims "negligence and breach of warranty," alleging that Defendant "failed to use reasonable care in the design, manufacture, and sale of the [Bovinol] product." Compl. ¶ 18. To the extent that this claim also is predicated on failure to warn and inadequate labeling, it too is preempted by FIFRA. *National Bank of Commerce,* 165 F.3d at 608. A claim of negligence for defective manufacture or design, which does not directly attack the EPA-approved labeling, may escape FIFRA's preemption. *Id.* at 609. However, merely alleging that a claim is a design or manufacturing defect claim does not automatically avoid FIFRA's express preemption clause. *See Grenier v. Vermont Log Bldgs., Inc.,* 96 F.3d 559, 564 (1st Cir.1996). Netland's liability expert, Dr. Lipsey, testified that Bovinol is safe as long as it is used properly and is distributed with appropriate labeling. Netland has not produced any evidence of errors in the manufacture of Bovinol by Defendant other than the adequacy of the warning. *See National Bank of Commerce,* 165 F.3d at 609 (holding that plaintiff's defective manufacturing or design claims fail because they lack sufficient evidentiary support to avoid summary judgment). Netland's only elaborated theory under the negligence claim is that Bovinol was defectively designed or manufactured because it was foreseeable that it would be used on horses and it was unfit for this use. This semantically reworked claim is essentially nothing more than a repeat salvo on the label's failure to warn against use on horses before riding. *See Johnson v. Monsanto Chemical Co.,* 129 F.Supp.2d 189, 194-95 (N.D.N.Y.2001) ("Claims of misdesign or mismanufacture which the Court regards as thinly veiled labeling or failure to warn claims will not stand."). FIFRA preempts Netland's "negligence" claim. *See Grenier,* 96 F.3d at 564-65.

Netland's breach of an express warranty claim is necessarily based on the EPA- approved label. The Eighth Circuit has held that FIFRA preempts common law claims for breach of express warranty. *See Welchert,* 59 F.3d at 73. Similarly, FIFRA preempts Netland's breach of an implied warranty claim. *National Bank of Commerce,* 165 F.3d at 608. To allow Netland's warranty claims would result in additional or different requirements for the Bovinol label or package. *Id.* Summary judgment is thus appropriate for Netland's warranty claims.

3. "Strict liability" claim

To establish a strict liability claim, Minnesota law requires a plaintiff to prove that: (1) the defendant's product was in a defective condition unreasonably dangerous for its intended use, (2) the defect existed when the product left the defendant's control, and (3)the defect was the proximate cause of the injury sustained. *Marcon v. Kmart Corp.,* 573 N.W.2d 728, 730 (Minn.App.1998) (citing *Bilotta v. Kelley Co.,* 346 N.W.2d 616, 623 n. 3 (Minn.1984)). In determining whether a product is defective, Minnesota courts apply a "reasonable care balancing test." *Drager by Gutzman v. Aluminum Industries Corp.,* 495 N.W.2d 879, 882 (Minn.App.1993). A manufacturer is obligated to exercise a degree of care in its design that avoids any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which it was intended or in a manner that was reasonably foreseeable. *Id.*

Netland cannot elude FIFRA's preemption provision simply by alleging a strict liability claim. *See Grenier,* 96 F.3d at 564. The evidence must be examined to determine whether Netland's strict liability claim is premised on something other

than the label and whether the claim indirectly attempts to impose label requirements in addition to or different than those required by the EPA. *See id.; National Bank of Commerce,* 165 F.3d at 608-09. Netland argues that because the Bovinol label indicates an intended use for the control of insects in livestock barns, including horse barns, Netland's use of Bovinol on his horses before he rode them was intended or reasonably foreseeable. *See* Mem. In Oppos., at 9. However, Netland's liability expert testified that Bovinol is safe as long as it is used properly and is distributed with appropriate labeling. Moreover, as required by FIFRA, the EPA determined that Bovinol would perform its intended function without unreasonable adverse effects on humans and, when used in accordance with widespread and commonly recognized practice, it would not generally cause unreasonable adverse effects on humans. *See* 7 U.S.C. § § 136a(c)(5), 136(j). Because Netland fails to present evidence showing that Bovinol was unreasonably dangerous, Netland cannot meet the first element of a strict liability claim. *See National Bank of Commerce,* 165 F.3d at 609 (finding plaintiff did not present evidence proving that the product was unreasonably dangerous and whether the defective condition proximately caused the harm).

Essentially, Netland's strict liability theory is that Bovinol was in a defective condition unreasonably dangerous for its intended use because it was foreseeable that it would be sprayed on horses before riding them and it was unfit for this use. This claim is simply another condemnation of the label's failure to warn against using Bovinol on horses before riding them. *See Grenier,* 96 F.3d at 564-65. Netland's strict liability claim indirectly attempts to impose label requirements in addition to or different than those imposed by the EPA. FIFRA preempts such claims, regardless of the form in which they

appear.

Because FIFRA preempts Netland's claims, the Court does not reach Defendant's arguments that Netland is unable prove causation.

IV. CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein, **IT IS HEREBY ORDERED** that Defendant Hess & Clark's Motion for Summary Judgment [Doc. No. 31] is **GRANTED.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-2182

Kim Netland,
Appellant,

v.

Hess & Clark, Inc.,
Appellee.

Order Denying Petition for
Rehearing and for Rehearing
En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Melloy took no part in the consideration of this matter.

(5128-010199)

May 13, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
SEP 12 2002
CLERK

No. 02-219

In The

Supreme Court of the United States

KIM NETLAND,

Petitioner,

v.

HESS & CLARK, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals err in holding, consistent with the precedent of nine federal circuits, that FIFRA pre-empts Petitioner's failure-to-warn and other labeling-related state damages actions?

RULE 29.6 STATEMENT

Respondent Hess & Clark, Inc. certifies that it is a wholly-owned subsidiary of Loveland Industries, Inc., which in turn is a wholly-owned subsidiary of United Agri Products, Inc., which in turn is a wholly-owned subsidiary of ConAgra Foods, Inc. Other than ConAgra Foods, Inc., no publicly held company owns 10% or more of Respondent's stock. Of the companies listed above, only ConAgra Foods, Inc. is a publicly-traded company.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Petitioner candidly admits that a "*large majority* of FIFRA preemption decisions" hold that the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136v, *et seq.*, expressly preempts state law damages claims that challenge the labeling of a pesticide approved by the United States Environmental Protection Agency ("EPA"). Pet. at 11 (emphasis added). Indeed, all nine of the United States Courts of Appeals that have considered the question in the decade since this Court's seminal express preemption opinion in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) have reached this conclusion. Thus, Petitioner asks this Court to grant the petition for a writ of certiorari despite unanimous circuit court precedent.

The federal appellate authority described above is not only unanimous, but also correct. FIFRA provides EPA exclusive authority concerning pesticide labeling, and to promote national uniformity FIFRA expressly prohibits the states from imposing any "requirements for labeling . . . in addition to or different from those required under FIFRA." 7 U.S.C. § 136v(b). Because Petitioner's action against Respondent seeks to impose a common law labeling requirement on Bovinol® that would be "in addition to or different from" that required by EPA under FIFRA, the court of appeals correctly held that FIFRA preempts Petitioner's action.

STATEMENT OF THE CASE

During all times relevant herein, Bovinol® was an insecticide registered with EPA under FIFRA and carried an EPA-approved label. That label identifies all of Bovinol®'s legal and approved uses, none of which include use on horses. The Bovinol® label lists various warnings and precautions, including instructions to use specific personal protective gear when spraying Bovinol®. Part of the label reads:

> **HAZARDOUS TO HUMANS AND DOMESTIC ANIMALS WARNING**
>
> May be fatal if swallowed, inhaled or absorbed through the skin or eyes. Rapidly absorbed through skin and eyes. *Do not get into eyes, on skin or on clothing. Do not breathe vapor or spray mist. . . .*
>
> Wear *clean natural rubber gloves, protective clothing, and goggles, faceshield or equivalent. Wear a pesticide respirator* jointly approved by the Mining Enforcement and Safety Administration (MESA) and the National Institute for Occupational Safety and Health (NIOSH) under the provisions of 30 CFR Part 11. *Wear impervious footwear or protective covers* as shoes, boots and other articles made of leather or similar porous materials may be dangerously contaminated.

See Pet. App. 12a-13a (emphasis added). Petitioner did not read the label, he used the product on horses, and he did not wear any of the personal protective equipment required by the label. *See* Pet. App. 13a-14a.

Thus, this case involves substantial misuse of the subject product by the Petitioner. Under § 12(a)(2)(G) of FIFRA (7 U.S.C. § 136j(a)(2)(G)), it is unlawful "to use any

registered pesticide in a manner inconsistent with its labeling."

Dr. Richard Lipsey, the expert upon whom Petitioner pins his allegation that Bovinol® is defective, testified at some length about dichlorvos, the active ingredient in Bovinol®. Dr. Lipsey testified that Bovinol® is an EPA-registered and EPA-approved product that can be safely used under appropriate circumstances. Dr. Lipsey added that he personally sprays his own horses before riding them with pyrethrum (a different pesticidal active ingredient), that he personally recommends pyrethrum for horses, and that most people use pyrethrum for horses. Pet. App. 9a.

Other than his personal preference for pyrethrum, Dr. Lipsey's remaining complaints with Bovinol® all directly challenge the pesticide's labeling. First, Dr. Lipsey stated "[a] prudent manufacturer would have put the fact that [Bovinol] can affect bone marrow; that this . . . can cause leukemia [on the label]." Dr. Lipsey's second complaint is that the label is not specific about the parameters of using the product on horses. In particular, Dr. Lipsey testified, "[the label does not say] 'Do not apply to horses.' They said okay to horse barns and okay to pests that get on horses, but they didn't exclude horses, so you can assume that you can apply it to horses." Dr. Lipsey's final complaint with Bovinol® also concerns the pesticide's labeling, but in this instance, he opines that the label's instructions to the user to use personal protective equipment is "overkill," and that the label should merely state "avoid breathing the vapors" or "avoid getting it on your skin." Pet. App. 9a-10a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT IN THE FEDERAL APPELLATE COURTS.

Since this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), "every federal court of appeals that has addressed the issue before us has . . . held that both failure-to-warn and labeling-based claims brought under common-law causes of action against manufacturers of pesticides are preempted by [7 U.S.C.] § 136v." *Ackles v. Luttrell*, 561 N.W.2d 573, 577 (Neb.), *cert. denied*, 522 U.S. 928 (1997). The nine federal Courts of Appeals to so conclude have largely relied upon the *Cipollone* Court's holding that express preemption of state "requirements" normally encompasses not only positive enactments such as statutes and regulations, but also state requirements sought to be imposed through common law actions for damages.[1] No federal appellate court has held to the contrary.

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[1] *See, e.g., Netland v. Hess & Clark*, 284 F.3d 895, 898 (8th Cir. 2002); *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244, 249 (3d Cir. 1999); *Andrus v. Agrevo USA Co.*, 178 F.3d 395, 398-99 (5th Cir. 1999); *National Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 607-08 (8th Cir. 1999); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 661-62 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998); *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 563 (1st Cir. 1996); *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 71 (8th Cir. 1995); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995); *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 129 (4th Cir. 1995); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887, 888 (8th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 749 (4th Cir. 1993); *King v. E.I. DuPont de Nemours and Co.*, 996 F.2d 1346, 1349 (1st Cir.), *cert. dismissed*, 510 U.S. 985 (1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516, 520 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993); *Arkansas-Platte & Gulf*

(Continued on following page)

This Court itself has indicated that *Cipollone* informs express preemption analysis under FIFRA. Shortly after it decided *Cipollone*, "the Court vacated two courts of appeals judgments that FIFRA *impliedly* preempted state law failure-to-warn claims and remanded for those courts to reconsider their decisions in light of *Cipollone*." *King v. E.I. DuPont de Nemours and Co.*, 996 F.2d 1346, 1349 (1st Cir. 1993) (emphasis added).[2] On remand, both courts held that FIFRA *expressly* preempted state law failure-to-warn claims.[3]

Naturally, Petitioner attempts to focus this Court's attention on the isolated exceptions to this overwhelming authority. He is only able, however, to cite to one dated, discredited federal appellate court decision and two state court decisions. The federal court decision – *Ferebee v. Chevron Chemical Company*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) – is inconsistent with this Court's subsequent opinions in *Cipollone* and *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). Since *Cipollone*,

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Partnership v. Van Waters & Rogers, Inc., 981 F.2d 1177, 1179 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993).

[2] *See Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *vacated and remanded*, 505 U.S. 1215 (1992); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.), *vacated and remanded*, 506 U.S. 910 (1992).

[3] *See Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993). *See also King*, 996 F.2d at 1349 ("The Supreme Court has itself indicated that *Cipollone* applies to FIFRA preemption determinations."); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995) ("The Supreme Court . . . has indicated that its analysis in *Cipollone* should be applied to FIFRA preemption determinations.").

courts have overwhelmingly concluded that "[r]eliance on *Ferebee* is misplaced because it is no longer good law." *Etcheverry v. Tri-Ag Service, Inc.*, 93 Cal. Rptr. 2d 36, 42 (2000).

In *Ferebee* the court held that, because a defendant could choose to ignore a jury verdict, common law claims do not impose "requirements" as that term is used in an express preemption clause. In *Cipollone*, this Court rejected this very analysis. The Court explained that common law damages actions are premised on the existence of a legal duty and accordingly, such actions necessarily impose "requirements." *Cipollone*, 505 U.S. at 522. In reaching this conclusion, the *Cipollone* Court stressed that

> "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

Cipollone, 505 U.S. at 521 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).[4] Although the District of Columbia Circuit has not expressly overruled *Ferebee*, it has acknowledged that *Cipollone* repudiated *Ferebee's* central premise by "explaining

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[4] In *Cipollone*, three Justices cited *Ferebee* in support of their dissent from the Court's holding that the later of the two statutes considered by the Court (the 1969 Act) preempted common law claims. 505 U.S. at 537 (Blackmun, J., concurring in part and dissenting in part). This opinion makes clear that the Court has already considered, and rejected, the unduly narrow view of preemption represented by *Ferebee*.

that damage actions can be used to enforce state regulations as effectively as other forms of preventive relief and thus damage actions must be preempted where positive enactments are preempted . . ." *Waterview Management Co. v. F.D.I.C.*, 105 F.3d 696, 699 (D.C. Cir. 1997).

Of the two state court opinions Petitioner cites, one relies on *Ferebee* and the other, from an intermediate appellate court, contains virtually no analysis whatsoever. *See Sleath v. West Mont Home Health Services, Inc.*, 16 P.3d 1042 (Mont. 2000), *cert. denied*, 122 S. Ct. 40 (2001) and *Brown v. Chas. H. Lilly Co.*, 985 P.2d 846 (Or. Ct. App. 1999), *rev. denied*, 6 P.3d 1098 (Or. 2000), respectively. Neither of these two aberrant state court decisions is sufficient to create a significant conflict among the lower courts, particularly given the fact that, since *Cipollone*, the appellate courts of at least 24 states have reached a conclusion consistent with the federal courts.[5]

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[5] *See Traube v. Freund*, ___ N.E.2d ___, 2002 WL 1881206 (Ill. Ct. App. Aug. 14, 2002); *Dow Chemical Co. v. Ebling*, 753 N.E.2d 633 (Ind. 2001); *Etcheverry v. Tri-Ag Service, Inc.*, 93 Cal. Rptr. 2d 36 (Cal. 2000); *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000); *Lewis v. American Cyanamid Co.*, 715 A.2d 967 (N.J. 1998); *Ackles v. Luttrell*, 561 N.W.2d 573 (Neb.), *cert. denied*, 522 U.S. 928 (1997); *Barnes v. Sandoz Crop Protection Corp.*, 938 P.2d 95 (Ariz. App. Div. 1997); *Romah v. Hygenic Sanitation Co.*, 705 A.2d 841 (Pa. Super. Ct. 1997), *aff'd*, 737 A.2d 249 (Pa. 1999); *Eide v. E.I. Du Pont de Nemours & Co.*, 542 N.W.2d 769 (S.D. 1996); *Buddington v. Sterling Winthrop, Inc.*, 1996 Conn. Super. LEXIS 2402 (Conn. Super. Ct. 1996); *Babalola v. Chrystal Chemicals Inc.*, 644 N.Y.S. 2d 1 (N.Y. App. Div. 1996); *Hopkins v. American Cyanamid Co.*, 666 So. 2d 615 (La. 1996); *Gorton v. American Cyanamid Co.*, 533 N.W.2d 746 (Wis. 1995), *cert. denied*, 516 U.S. 1067 (1996); *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995); *Hochberg v. Zoecon Corp.*, 657 N.E.2d 1263 (Mass. 1995); *Wadlington v. Miles, Inc.*, 922 S.W.2d 520 (Tenn. Ct. App. 1995), *appeal denied* (Tenn. Mar. 25,

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II. THE COURT OF APPEALS CORRECTLY HELD THAT FIFRA EXPRESSLY PREEMPTS PETITIONER'S COMMON LAW LABELING CLAIMS.

The language of FIFRA's preemption clause, EPA's pervasive and comprehensive regulation of pesticide labeling, and this Court's precedents all support the decisions of the nine federal appellate courts upholding preemption, including the decision below.

A. FIFRA Gives EPA Exclusive Authority to Regulate Pesticide Labeling.

To promote the goals of FIFRA, Congress vested in EPA the exclusive authority to regulate the content of pesticide labeling. In its exercise of this authority, EPA has established a comprehensive regulatory scheme to ensure the proper content of pesticide labeling. Before a pesticide may be sold in the United States, it must be registered and its labeling approved by EPA. 7 U.S.C. § 136a(a). To secure registration, an applicant must submit proposed "labeling" for the product to EPA. 7 U.S.C. § 136a(c)(1)(C). "Labeling" includes not only the written or graphic matter

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1996); *Hue v. Farmboy Spray Co.*, 896 P.2d 682 (Wash. 1995); *Jenkins v. Amchem Products, Inc.*, 886 P.2d 869 (Kan. 1994), *cert. denied*, 516 U.S. 820 (1995); *Brennan v. Dow Chem. Co.*, 613 So. 2d 131 (Fla. 4th Dist. Ct. App. 1993); *ICI Americas, Inc. v. Banks*, 440 S.E.2d 38 (Ga. Ct. App. 1993), *aff'd in relevant part*, 450 S.E.2d 671 (Ga. 1994); *Moody v. Chevron Chem. Co.*, 505 N.W.2d 900 (Mich. Ct. App. 1993), *appeal denied*, 525 N.W.2d 450 (Mich. 1994); *Hopkins v. Ciba-Geigy Corp.*, 432 S.E.2d 142 (N.C. Ct. App. 1993); *Yowell v. Chevron Chem. Co.*, 836 S.W.2d 62 (Mo. Ct. App. 1992); *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 507 U.S. 1051 (1993).

attached to the container itself, but also all written, printed, or graphic matter accompanying the container or to which reference is made on the attached label. 7 U.S.C. § 136(p). EPA has promulgated detailed regulations specifying the scope, content, wording, and format of pesticide labeling. *See* 40 C.F.R. § 156.

Under FIFRA, it is unlawful for any person, including a manufacturer, to alter EPA-approved labeling in any way without EPA's prior approval. *See* 7 U.S.C. § 136j(a)(2)(A). As a result, pesticide manufacturers are not free to add additional warnings on their own after a particular label has been approved. EPA's regulations require that any proposed labeling change requiring consideration of scientific data (such as additions or modifications of a warning or precaution) must be reviewed and approved by EPA in advance. *See* 40 C.F.R. § 152.81(b)(4). In addition, submission of additional unreasonable adverse effects information is required by EPA after a pesticide has been registered. *See* 40 C.F.R. § 159.184. Such adverse effects information can lead to EPA-imposed labeling changes. *See* 43 Fed. Reg. 37,611, 37,613 (1978).

EPA may not register a pesticide or approve its labeling unless the agency finds that the product does not pose any "unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of [its] use." 7 U.S.C. § 136(bb). In registering Bovinol® and approving its labeling, EPA necessarily concluded that this standard was satisfied.

B. FIFRA's Preemption Clause Expressly Prohibits State-Imposed Labeling Requirements, Including Those Imposed Through the Common Law.

Under the analysis this Court established in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), EPA's exclusive federal regulation of pesticide labeling expressly preempts any state-imposed pesticide labeling requirements, as the federal appellate courts that have considered this issue all have recognized. In *Cipollone*, the Court interpreted the preemption clause in the Public Health Cigarette Smoking Act of 1969 ("PHCSA"), which preempted "*requirement[s]* or prohibition[s] based on smoking and health . . . with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." 505 U.S. at 515 (quoting § 5(b) of PHCSA) (emphases added). The Court held that the use of the word "requirement" indicated Congress's intent to preempt state common-law labeling claims. *Cipollone*, 505 U.S. at 521-25.

Like the PHCSA, FIFRA demonstrates that Congress intended to preempt state common-law claims premised on allegedly inadequate pesticide labeling. In 7 U.S.C. § 136v, Congress confirmed that the states may regulate the sale or use of EPA-registered pesticides, but expressly prohibited any state from establishing independent labeling or packaging requirements:

> § 136v Authority of States
>
> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does

> not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any *requirements* for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v (emphasis added). As the U.S. Courts of Appeals cited above have held, FIFRA's preemption of state "requirements" indicates Congress' intent to displace labeling requirements imposed by state statutes, regulatory enactments, *and* common law. *See* cases cited at note 1.

Petitioner tries to attach great significance to the fact that under FIFRA, the pesticide registrant submits proposed labeling, while Congress drafted the warning language at issue in *Cipollone*. Of course, the reason that Congress did not mandate the precise language of pesticide labeling in FIFRA is because it would be completely impractical to do so. Unlike products such as cigarettes, which are relatively uniform and amenable to across-the-board warnings for the hazards they pose, each pesticide product differs in terms of its unique combination of active and inert ingredients, physical and chemical characteristics, formulation type, environmental behavior, use patterns, and toxicity.[6]

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[6] "FIFRA cannot impose a specific language requirement for warning labels like the 1969 Cigarette Act because FIFRA regulates a wide variety of products that cannot be serviced by a single statement." *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 560 (9th Cir. 1995).

Petitioner does not dispute that EPA retains exclusive authority over pesticide labeling, as discussed above in Part II(A). This comprehensive EPA control over labeling helps to demonstrate why the courts have so uniformly concluded that *Cipollone* governs the interpretation of FIFRA's preemption clause.

Four years after deciding *Cipollone*, this Court returned to express preemption analysis, reaffirming the essential principles of *Cipollone* in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). In *Medtronic*, a five-Justice majority reaffirmed *Cipollone*'s holding that "state common-law damages actions *do impose 'requirements'* and are therefore pre-empted where such requirements would differ from those imposed by [statute]." *Medtronic*, 518 U.S. at 509 (O'Connor, J.); *id.* at 504-05 ("ordinarily, insofar as the MDA pre-empts a state requirement embodied in a state statute, rule, regulation, or other administrative action, it would also pre-empt a similar requirement that takes the form of a standard of care or behavior imposed by a state-law tort action") (Breyer, J.).

The divided *Medtronic* Court held that the Medical Device Amendments of 1976 (the "MDA") did not preempt plaintiffs' claims premised on the alleged defectiveness of a pacemaker. The Court's decision was based in large part upon the cursory review given the particular medical device by the Food and Drug Administration ("FDA"). Pursuant to 21 U.S.C. § 360(k) (§ 510k of the MDA), a manufacturer of a medical device may avoid the MDA's rigorous and time-consuming premarket approval process by demonstrating to the FDA that a device is "substantially equivalent" to a device already on the market before the MDA's 1976 effective date. Essentially a "grandfathering" clause, this "§ 510k process" "requires little information,

rarely elicits a negative response from the FDA, and gets processed very quickly." *Medtronic*, 518 U.S. at 479.

One striking difference between Medtronic's MDA preemption and the FIFRA preemption at issue here lies in the differing regulatory role of the federal agencies assigned with implementing the statutes. As Justice Stevens explained in *Medtronic*:

> Unlike the statute construed in *Cipollone*, for instance, pre-emption under the MDA does not arise directly as a result of the enactment of the statute; rather, in most cases a state law will be pre-empted only to the extent that the FDA has promulgated a relevant federal 'requirement.' . . . Congress explicitly delegated to the FDA the authority to exempt state regulations from the pre-emptive effect of the MDA – an authority that necessarily requires the FDA to assess the pre-emptive effect that the Act and its own regulations will have on state laws.

518 U.S. at 496-97. In distinguishing MDA preemption from FIFRA preemption, the California Supreme Court recognized that "Congress did not give EPA an analogous role in implementing FIFRA." *Etcheverry v. Tri-Ag Service, Inc.*, 93 Cal. Rptr. 2d 36, 44 (2000).[7]

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[7] As the *Etcheverry* court noted, "the overwhelming majority" of courts have held that "*Medtronic* does not undermine the conclusion that FIFRA preempts state failure-to-warn claims." 93 Cal. Rptr. 2d at 43. In addition to *Etcheverry*, the "overwhelming majority" includes, e.g., *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 563 (1st Cir. 1996); *Lewis v. American Cyanamid Co.*, 715 A.2d 967, 973 (N.J. 1998); *Oliver v. Reckitt & Coleman, Inc.*, 12 F. Supp. 2d 1287, 1291 (M.D. Fla. 1998); *Kuiper v. American Cyanamid Co.*, 960 F. Supp. 1378, 1384 (E.D.

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Another significant difference between FIFRA preemption and the preemption this Court rejected in *Medtronic* involves the level of scrutiny with which the responsible agency reviews the subject product. EPA's review of pesticide labeling is much more thorough than the FDA's review of § 510k medical devices, in which the safety of the device is not even considered. EPA examines each pesticide label, explicitly considering safety and warning issues, before the pesticide may be registered and marketed. *See* 7 U.S.C. § 136a(c)(5). The *Medtronic* Court's concern, then, with the cursory nature of the § 510k approval process simply has no application to the FIFRA preemption analysis.[8]

Petitioner mistakenly cites *Medtronic* for the proposition that there is no preemption here because the state law damages claim is "based on duties that parallel

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Wis. 1996); *Koch v. Shell Oil Co.*, 173 F.R.D. 288, 289 (D. Kan. 1997); *Ackerman v. American Cyanamid Co.*, 586 N.W.2d 208, 212 (Iowa 1998); *Sherman v. Claire Mfg. Co.*, 657 N.Y.S.2d 453, 454 (N.Y. App. Div. 1997); *Ackles v. Luttrell*, 561 N.W.2d 573, 579 (Neb. 1997); and *Didier v. Drexel Chem. Co.*, 938 P.2d 364, 367 (Wash. Ct. App. 1997).

See also Eyl v. Ciba Geigy Corp., ___ Neb. ___, ___ N.W.2d ___, 2002 Neb. LEXIS 198, *20 (Sept. 6, 2002) ("the preemption language employed in FIFRA [is] more similar to the statutory language in *Cipollone* than the statutory language in *Medtronic*").

[8] *See Lewis v. American Cyanamid Co.*, 682 A.2d 724, 731 (N.J. Super Ct. App. Div. 1996) ("FIFRA has no escape clauses like the 'grandfathering' and 'substantially equivalent' provisions of the MDA. The statute and regulations provide that substantially all pesticides are subject to extensive review by the EPA, and the EPA prescribes precise content for pesticide labels . . ."), *aff'd*, 715 A.2d 967 (N.J. 1998) ("[u]nlike the MDA, . . . FIFRA imposes specific labeling language on insecticide products").

requirements imposed under FIFRA." Pet. at 25. Petitioner (despite not reading the labeling) contends that the EPA-approved labeling did *not* provide him with adequate warnings to ensure his safety. "FIFRA does not allow states to second-guess EPA's labeling decisions under the guise of enforcing the requirements of FIFRA itself." *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 666 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998).

Petitioner also relies heavily on a position taken by the Justice Department as *amicus curiae* in two cases, one in which plaintiffs alleged that the pesticide did not work and the other in which plaintiffs alleged that the pesticide damaged their crops. *See Etcheverry v. Tri-Ag Service*, 93 Cal. Rptr. 2d 36 (Cal. 2000); *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000). The government's position (a) was never raised by the government until 1999, after years of uniform holdings to the contrary; (b) was rejected by the California Supreme Court in *Etchevery*,[9] and (c) has not been advocated by the government since *Etcheverry*.[10]

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[9] In *Hart*, the issue before the court was whether the defendants properly removed the case to federal court under the "complete preemption doctrine." The Fifth Circuit held that because FIFRA preemption did not provide a "complete" defense to all pesticide claims, but instead was limited to warning and labeling claims, complete preemption did not obtain. 199 F.3d at 244-46. Notably, the Fifth Circuit's holding that FIFRA preempts labeling claims, reached in *MacDonald v. Monsanto*, 27 F.3d 1021 (5th Cir. 1994), was not questioned in *Hart*, nor has it been since.

[10] In *Eyl v. Ciba Geigy Corp.*, ___ Neb. ___, ___ N.W.2d ___, 2002 Neb. LEXIS 198 (Sept. 6, 2002), the Nebraska Supreme Court recently rejected arguments similar to plaintiff's here that rely on the Justice Department's *amicus curiae* brief in *Etcheverry*:

(Continued on following page)

Petitioner's position that his claims are not preempted because Hess & Clark could have warned through means other than the labeling, Pet. at 26-28, is likewise inconsistent with FIFRA and the vast majority of courts that have interpreted it. The Bovinol® labeling contains all the warnings a user needs to utilize the product safely. A common law claim based on the premise that Hess & Clark should have provided different warnings through other channels "necessarily impl[ies] that the labeling and packaging failed to warn the user." *Papas v. Upjohn Co.*, 985 F.2d 516, 520 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993). Thus, such a claim is preempted.

Similarly, Petitioner's discussion of the legislative history of the 1972 amendments to FIFRA does not call into question the consistent case law rejecting his position. In a straightforward application of an elementary canon of statutory construction, the "plain wording" of an express preemption clause "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v.*

> [W]e give no deference to the EPA's position in the *amicus* brief filed in *Etcheverry*. The *Etcheverry* brief was written for that specific case. The EPA did not file an *amicus* brief with the court in this case. . . . In addition, the record is silent whether the view expressed in the *Etcheverry* brief was an official EPA policy statement for all cases and if the EPA still adheres to that view. Further, we note that in *Etcheverry*, the California Supreme Court did not adopt the EPA's arguments. . . . Under these circumstances, we give no deference to the position taken in the *Etcheverry* brief.

Id. at *24. The *Eyl* court further cited with approval the Eighth Circuit Court of Appeals' decision in this case rejecting plaintiff's request that the court overrule FIFRA preemption precedent based on *Medtronic, Sleath* and *Brown* and on the EPA's brief in *Etcheverry*. *Id.* at *25.

Easterwood, 507 U.S. 658, 664 (1993). Case after case has held that the plain wording of § 136v(b) both encompasses and preempts state law failure-to-warn claims.

In fact, the legislative history *supports* the conclusion that FIFRA preempts common law claims. For example, the original House Report by the Agriculture Committee provides that "[i]n dividing the responsibilities between the States and the Federal Government for the management of an effective pesticide program, the [House Agriculture] Committee has adopted language which is intended to completely preempt State authority in regard to labeling and packaging." *Id.* at 16. Just as important, "none of the legislative history distinguishes legislative enactments from common law." *MacDonald*, 27 F.3d at 1025 n.3. In view of § 136v(b)'s express preemption of additional or different labeling requirements, it is reasonable to assume that if Congress wanted to save damages claims from preemption, it would have said so in the statute or in the legislative history.

III. PETITIONER'S CLAIMS ARE ALSO IMPLIEDLY PREEMPTED BY FIFRA.

While Petitioner's claims against Hess & Clark are expressly preempted by 7 U.S.C. § 136v(b), a submission of those claims to an implied preemption analysis yields the same result.[11] Under its FIFRA-delegated authority, EPA

[11] Hess & Clark raised the implied preemption argument in the Eighth Circuit, but the court did not reach the issue, instead basing its decision on express preemption. In *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-70 (2000), this Court held that the existence of an express preemption clause in a statute does not foreclose the

(Continued on following page)

has provided that "[a] registrant may distribute or sell a registered product with the composition, packaging and labeling currently approved by the agency." 40 C.F.R. § 152.130(a). Because federal law permitted Hess & Clark to sell Bovinol® with the particular chemical composition and labeling at issue, imposition of liability on Hess & Clark for the exercise of this option would conflict with the regulatory structure of FIFRA. "[A] state cannot impose common law damages on individuals for doing what a federal act or regulation 'authorized them to do.'" *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (7th Cir.) (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)), *cert. denied*, 525 U.S. 1018 (1998).

Under well-settled jurisprudence from this Court, "a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Implied conflict preemption exists, as here, "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Congress's desire for uniformity would be undermined if, after EPA approved the composition and labeling of Bovinol®, the product's manufacturer found itself subject to an array of state common law actions challenging the product's composition and labeling.

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application of implied conflict preemption analysis with respect to that statute. *See also Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352 (2001).

CONCLUSION

Federal appellate courts have unanimously concluded that in *Cipollone*, this Court essentially decided the very issue raised in this petition. These courts have held that FIFRA preempts state claims for damages that are premised on an allegation that pesticide labeling approved by EPA is inadequate. There is simply no reason for the Court to hear this case. Accordingly, Respondent Hess & Clark, Inc. respectfully asks that this Court deny the petition for writ of certiorari.

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September 12, 2002

(3)

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NO. 02-219

IN THE

Supreme Court of the United States

KIM NETLAND,

Petitioner,

v.

HESS & CLARK, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent does not dispute that there is a conflict in appellate authority on the question presented, but it maintains that the conflict is not deep enough to warrant review. It also contends that review should be denied because the decision below is correct. Respondent is incorrect on both scores.

1. Respondent concedes that two state appellate courts and the D.C. Circuit have held that a state-law damages claim premised on a defendant's failure to warn of a pesticide's dangers is not preempted by FIFRA. Respondent's main argument against review is that a large majority of federal and state rulings on that question are to the contrary, a point that petitioner acknowledges. Pet. 1. However, where, as here, there is an undisputed split in authority, and geographical happenstance dictates the rights of the public and the duties of a regulated industry, this Court has not hesitated to grant review of conflicts even if somewhat lopsided.

That inclination toward review is particularly pronounced in the preemption area. In several recent cases, the Court granted certiorari where the lower federal courts had unanimously found preemption of state-law tort claims, but at least some state courts had taken a different approach. For instance, in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court granted review and held that many of the plaintiff's state-law claims were not preempted by federal tobacco control legislation, despite the unanimity of lower federal court authority holding all claims preempted. *Id.* 508 n.2; *but see id.* at 508 n.3 (citing state court authority finding no preemption). Similarly, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the Court granted certiorari and held that the plaintiff's claims were not preempted by the federal medical device law, disagreeing in whole or in part with the views of eight federal circuits. And, next month, the Court will hear *Sprietsma v.*

Mercury Marine, No. 01-706, where review was granted despite the unanimity of federal appellate decisions holding state-law tort claims involving boat propeller injuries preempted by the federal Boat Safety Act. Indeed, in *Sprietsma*, with only one exception — a 1994 Texas Supreme Court decision — all federal and state court appellate decisions had held the state-law claims preempted. *See* Br. for Resp. in Opp. at 17 & n.5, in *Sprietsma v. Mercury Marine*, No. 01-706 (filed Dec. 20, 2001).

In responding to the conflict in authority, respondent takes particular aim at the D.C. Circuit's decision in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), which held that FIFRA does not preempt state-law damages claims. Respondent grudgingly acknowledges that the D.C. Circuit "has not expressly overruled *Ferebee*[.]" Opp. 6. It argues, however, that *Ferebee* has been "discredited" (*id.* at 5) by *Cipollone*, which respondent views as holding that federal preemption of state regulatory law on a particular subject matter necessarily means that state damages actions regarding that subject matter are preempted as well. *Id.* at 6. That argument does not undermine the circuit split; rather, it assumes the answer to the question presented: whether respondent's view of *Cipollone* controls the interpretation of FIFRA's preemption provision or, rather, whether, viewed in the context of FIFRA's text, purpose, and history, Congress rejected that position and left traditional state-law liability systems intact.

In fact, respondent's position equating direct state regulation and state common law is at odds with *Cipollone* itself. To be sure, in interpreting the Public Health Cigarette Smoking Act of 1969, the Court found preemption of some state-law damages claims, relying in part on the notion that such claims can exert regulatory pressure similar to that of direct state regulation. *Cipollone*, 505 U.S. at 521. However, in construing

the preemptive scope of the 1969 Act's predecessor — the Federal Cigarette Labeling and Advertising Act of 1965 — seven members of this Court found *no* preemption of *any* state-law damages actions, despite the Act's preemption of direct state regulation. In so holding, the Court stated that "there is no general, inherent conflict between [express] federal preemption of state [regulatory] warning requirements and the continued vitality of state common-law damages actions[.]" 505 U.S. at 518. That holding effectively embodies petitioner's position that there are significant differences between direct state regulation and state monetary liability and that, depending on the context, Congress may rationally decide to preempt the former while leaving the latter undisturbed. Indeed, this Court has made this point on other occasions as well. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) ("The effects of direct regulation ... are significantly more intrusive than the incidental effects of such an award provision. ...Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

In sum, the Court should grant the petition to resolve the important issue of federal law that it presents.

2. The petition explains why the ruling below, and the majority position in the lower courts, is inconsistent with FIFRA's text, history, and purpose. Pet. 18-29. Respondent, of course, argues that the ruling below is correct. Opp. 8-17. The opposition, however, ignores key indicators of Congressional and agency intent, including FIFRA's *anti*-preemption provision, 7 U.S.C. § 136v(a), which demonstrates that states may impose liability on manufacturers or even force EPA-approved pesticides off the market provided that they do not regulate the content of the labels themselves, and EPA's acknowledgment

that manufacturers may provide additional cautionary statements on labels to ward off potential state-law damages liability. *See* 49 Fed. Reg. 37,960, 37,971 (Sept. 26, 1984). Nor does respondent confront the fact that FIFRA's voluminous legislative history, drafted against a backdrop of a century of liability for pesticide manufacturer's failures to warn, does not even hint at preemption of state-law damages actions. *See* Pet. 21-22; *see also Silkwood*, 464 U.S. at 251("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by [respondent's tortious] conduct.").

Suffice it to say that the petition and opposition reveal the parties' very different understandings of the law and the significance of EPA pesticide registration. If this Court grants review, there will be time enough to reply to respondent's merits arguments in detail. However, for present purposes, the depth of the disagreement on the merits only emphasizes the need for review.[1]

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[1]Respondent acknowledges that the EPA and the Justice Department's public position on the question presented, in the *Etcheverry* litigation (decided just two years ago), is fully consistent with petitioner's position. Respondent speculates that the government's views may have changed, but it provides no basis for that speculation. *See* Opp. 15. Respondent dismisses the no-preemption position taken by the EPA/Justice Department in *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000), on the ground that the issue there concerned the propriety of removal under the complete preemption doctrine. Opp. 15 n.9. Not quite. Although the plaintiff won the *Hart* appeal on the basis of improper removal, the government also argued that FIFRA does not preempt *any* state-law damages claims. *See* Brief *Amicus Curiae* for the United States in Support of Appellants at 5-9, in *Hart v. Bayer Corp.*, No. 98-60496

(continued...)

3. The opposition does not even mention the court of appeals' ruling on petitioner's design-defect claim and makes no attempt to harmonize what is, in fact, a substantial conflict among the federal and state appellate courts on whether, and in what circumstances, FIFRA expressly preempts such claims. As the petition explains (at 15-18), a grant of review would resolve this issue.[2]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[1](...continued)
(5th Cir. filed March 1999) (lodged with this Court).

[2]The opposition states that petitioner's only challenge to the product itself (as opposed to its labeling) was his expert's "personal" preference for a different active ingredient. Opp. 3. That is not accurate. That expert stated, among other things, that his pesticide company had substituted another chemical for dichlorvos because the new ingredient was safer and more effective, and petitioner submitted scientific evidence linking dichlorvos with petitioner's illness. *See* Pet. 17 n.4, 8, 10 n.2. In any event, the sole question before this Court, and the sole question decided by the court of appeals, was preemption, not whether petitioner's evidence was sufficient to state a design-defect claim under Minnesota law.

Last, respondent argues that FIFRA impliedly preempts petitioner's claims. Opp. 17. Respondent is incorrect for a number of reasons, not the least of which is that, in general, the states are free to enforce their own regulations if they are more stringent than federal law, 7 U.S.C. § 136v(a), and that Congress has given the states primary authority for enforcing FIFRA. *Id.* § 136w-1. In any event, that issue was not decided below and is not fairly included in the question presented, either as formulated in the petition or in the opposition.

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